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IN THE

Supreme Court of the United States

October Term, 1950
No. 222

OSCAR SCHATTE, *et al.*,

Petitioners,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; RICHARD F. WALSH; ROY M. BREWER; LOEW'S, INCORPORATED, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 1, 1950.

Opinions Below.

The opinion of the District Court [R. 135-143] is reported in 84 Fed. Supp. 669. The opinion of the United States Court of Appeals, for the Ninth Circuit [R. 204-220], is reported in 182 F. 2d (Adv.) 158.

Reference is made to the concurrent opinions in the *Studio Carpenters Local Union 946* and *MacKay* cases, 182 F. 2d (Adv.) 168 and 170.

The judgment of the Court of Appeals was entered on May 1, 1950 [R. 221]. The jurisdiction of this Court is invoked under 28 U. S. Code 1251(1).

Question Presented.

Whether the United States District Court has jurisdiction of the parties without diversity of citizenship; and whether the second amended and supplemental complaint [R. 8], and amendment thereto [R. 134], filed by plaintiffs, individually, and for their class, state a claim upon which relief can be granted, in each of the four counts; under the Constitution and laws of the United States, particularly upon jurisdiction under:

28 U. S. Code 1331, as a civil action wherein the matter in controversy exceeds the sum and value of $3,000, exclusive of interest and costs, and arises under the Constitution and Section 7 of the Wagner Act (29 U. S. C. A. 157), as re-enacted in the Taft-Hartley Act, and Sections 301, 302, 303, 405(a) of the Social Security Act (42 U. S. C. A. 501, 502, 503; 26 U. S. C. A. 1603(a)(4)(5));

28 U. S. Code 1337, as a civil action arising under said Wagner and Taft-Hartley Acts, regulating commerce, and said Social Security Act insofar as it may be held to regulate commerce in the interstate business alleged;

28 U. S. Code 1343(1)(3) for the violation of civil rights;

Taft-Hartley Act, Sections 301 and 305 (29 U. S. C. A. 185, 187);

Sherman and Clayton Acts (15 U. S. C. A. 1, 2, 15).

Statutes Involved.

The pertinent statutory provisions are printed in Appendix A (App. pp. 1-8).

Statement.

The statement of the Court below is quoted as follows:

"Appellants are members of Local 946 of the United Brotherhood of Carpenters and Joiners of America, which is affiliated with the A. F. of L. The employer appellees are major motion picture studios, which manufacture motion pictures for interstate commerce, and the Association of Motion Picture Producers, Inc., which is composed of said studios. The labor appellees are the International Alliance of Theatrical and Stage Employees, a labor union affiliated with the A. F. of L., hereinafter referred to as the I.A.T.S.E., and certain of its officers. Many members of the I.A.T.S.E. work in the motion picture studios. * * * They filed a complaint in the district court on behalf of themselves and the other members of Local 946, persons similarly situated, asking for damages arising from breach of contracts and alleged conspiracies, and other wrongful acts.

First Count: "The complaint is divided into four purported causes of action. The first 'cause of action' alleges a series of written agreements between the Brotherhood of Carpenters and the I.A.T.S.E., and among the carpenters, I.A.T.S.E., other unions and employer appellees. The complaint alleges that said agreements provided that members of the Brotherhood of Carpenters should receive fixed hourly wages, a six-hour day and a closed shop; that only members of the Brotherhood should be permitted to do the carpentry work of the studios, and that the carpenters, and not the I.A.T.S.E., should do the work

of constructing sets on stages. It is then alleged that the employer appellees and the labor appellees entered into a conspiracy to replace the carpenters working in the studios with members of the I.A.T.S.E. in violation of the written agreements. Pursuant to conspiracy, it is alleged, the employer appellees systematically requested all the carpenters in their employ to do work on sets which had been constructed by members or permittees of the I.A.T.S.E. and, when the carpenters refused, ordered them to cease work and leave the premises unless and until they became willing to work under conditions less favorable than those provided in the written agreements. The purpose and effect of the conspiracy, according to the complaint, was to deprive appellants and carpenters in whose behalf they sue, of their contractual rights to work for the employer appellees under agreed conditions, including a six-hour day and a closed shop, and this deprivation is alleged to have continued to the time of filing the complaint.

"The 'first cause of action' also includes the allegation that the appellees falsely represented to the California State Unemployment Commission that the carpenters had left their work in a trade dispute, thus causing the Commission to deprive the carpenters, including appellants, of unemployment benefits to which they were entitled under federal and state laws.

SECOND COUNT: "The 'second cause of action' alleges that the deprivation of appellants' contractual rights to work was brought about and has been continued in effect by threats made by the I.A.T.S.E. to the employer appellees and other employers. It is further stated that subsequent to the enactment of the Labor-Management Relations Act of 1947, known as the Taft-Hartley Act, the carpenters sought to bargain with the employer appellees

but were rebuffed, whereupon they filed an unfair labor practice complaint against the employer appellees with the National Labor Relations Board; that the complaint was investigated by a field examiner who was, as the Labor Board officers well knew, a member of the I.A.T.S.E.; and that the complaint was dismissed on the recommendation of the field examiner.

THIRD COUNT: "The 'third cause of action' alleges that the rights under the National Labor Relations Act to bargain collectively and to have a fair hearing on charges of unfair labor practices, and the right to unemployment benefits, arising under the Social Security Act, 42 U. S. C. A. Sec. 503, and the California Unemployment Insurance Act, are at the same time civil rights of citizens of the United States of which appellants were deprived by the acts of appellees alleged in the preceding 'causes of action.' It is alleged that appellees thereby became liable for damages to appellants and the carpenters under the Civil Rights Acts, 8 U. S. C. A. Secs. 43, 47.

FOURTH COUNT: "The 'fourth cause of action' alleges that the employer appellees compelled smaller motion picture producers to replace the carpenters with the less efficient members of the I.A.T.S.E., with the intention and effect of increasing the smaller studios' cost of production beyond their financial capacity and eventually eliminating all competition against the financially stronger employer appellees. In addition to a general allegation of damage to appellants' business and property within the meaning of the Sherman and Clayton Acts, 15 U. S. C. A. Sec. 15, it is alleged that appellants will suffer in the future by being required to pay increased prices of admission to motion picture theatres."

The Court's statement omits reference Paragraph X of the fourth count, added to the complaint by amendment [R. 134], as follows:

> "X. That the conspiracies, and each of them, hereinbefore alleged in the paragraphs adopted from the First Cause of Action, and in this Cause of Action, have been in restraint of trade, and commerce, among the several states, and with foreign nations, within the meaning of the Sherman Act (15 U. S. C. A. 1); and that plaintiffs, and the members of the class for whom they sue, have been injured in their business and property by reason thereof, within the meaning of the Clayton Act (15 U. S. C. A. 15) to their damage as hereinbefore alleged."

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that the decision in the former case of *Schatte v. IATSE, et al.*, 70 Fed. Supp. 1008, as adopted in 165 F. 2d 216, "alleging the same written agreements and some of the same wrongful acts and deprivation of rights as are alleged here" is "decisive as to the same issues presented in the instant case" [R. 208].

2. In holding that "Appellants, while employed as carpenters, became involved in a jurisdictional dispute with I.A.T.S.E., refused to perform certain work and were, in effect, discharged" [R. 205].

3. In holding "it unnecessary to determine whether or not the complaint states a cause of action under (Taft-Hartley) Sec. 301 for the reason that said section was enacted subsequent to the alleged breach of contract in the instant case and the section is therefore inapplicable" [R. 210].

4. In holding that "The breach of contract alleged was total and absolute on or about September 23, 1946, and

the cause of action, if any, for such breach accrued in its entirety at that time," on said theory that petitioners were then "discharged," and that they could "sue only once and at that time recover all present and future damages" [R. 211].

5. In holding that "The alleged continuous acts of barring appellants from employment subsequent to the enactment of Sec. 301 * * * could not in themselves constitute 'violation of contracts' within the meaning of Sec. 301 because, according to the complaint, no contracts between appellants and appellees remained outstanding" [R. 121].

6. In holding "that the complaint does not allege an act or acts by appellees which are declared unlawful by Sec. 303(a)," and that "The statute does not make actionable a mere threat of a strike or concerted refusal to work made by a union to an employer," although the IATSE threats were "to the effect that if appellants were permitted to do certain carpentry work in the studios, all work would be stopped in the studios, exchanges and theatres" [R. 214].

7. In holding that "Deprivation of the rights guaranteed by Sec. 7" of the Wagner Act would have been an unfair labor practice under Sec. 8(1) thereof, and "that the exclusive remedy" therefor was in proceedings before the Labor Board [R. 215].

8. In holding that "Whatever privileges and immunities were created by the National Labor Relations Act were limited in scope to the remedies which were provided for enforcing those privileges and immunities," before the Labor Board, and in holding that "a hearing was granted," and that any "erroneous finding by a hearing officer," alleged to have been disqualified because a member of the

accused IATSE [R. 28], was "not a deprivation of an equal privilege or immunity" [R. 217].

9. In holding that "The allegations that appellees made misrepresentations to the California Unemployment Commission with the *intent and effect* of wrongfully depriving appellants of unemployment benefits are likewise insufficient under the Civil Rights Act. 8 U. S. C. A. Sec. 43 is inapplicable because appellees are not alleged to have deprived appellants of rights while acting 'under color of any statute, ordinance, regulations, custom or usage, of any State or Territory'" [R. 218].

10. By holding that "Assuming that Sec. 303(a)(3) of the Social Security Act, 42 U. S. C. A. Sec. 503(a)(3), and related laws do create a federal right to a fair and impartial hearing for those denied unemployment compensation, that right is enforceable only to the extent of the remedies provided by law for enforcing it" [R. 218]. The pertinent provisions of the Social Security Act are given in Appendix A (App. p. 5).

11. By holding that "There is nothing in the allegations to show that appellants were hindered or prevented in any way from pursuing the remedies open to them or that the proceedings on the application for benefits were tainted by conspiracy or fraud" [R. 218].

12. By holding that "Another reason why no cause of action is stated under 15 U. S. C. A. Sec. 15 is that no damage to their business or property which stems from a conspiracy in violation of anti-trust laws is alleged. The loss of their rights of employment is not a result of any lessening of commercial competition among the studios [R. 220].

13. In affirming the dismissal of said action [R. 221].

Reasons for Granting the Writ.

The reasons for granting the writ are based upon direct conflicts between the decision of the Court below in the instant case, and decisions of this Court, and of Courts of Appeals from other Circuits, upon questions that are of vital importance to great numbers of people, and to the public interest:

In the maintenance of constitutional administrative law and procedure;

In protecting *bona fide* collective bargaining under Section 7 of the National Labor Relations Act, as re-enacted in the Labor Management Relations Act, and good faith observance of contracts negotiated thereunder free from conspiracy and fraud;

In protecting the purposes of the Social Security Act, and its vast coverage, and lawful administration and use of Social Security funds allocated to State Unemployment Agencies; and

In upholding the Civil Rights Act, in its application to cases where employers conspire to, and cause state officials to violate the Constitution and laws of the United States, and of the State under color of said State laws, by applying them contrary to the decisions of the State Supreme Court;

In protecting employees from arbitrary and capricious denials of unemployment insurance compensation, and disability benefits, due them from said trust funds, accruing from federal Social Security taxes;

To consider, upon an opportunity to present an exhaustive brief, the question vital to many millions of people, whether collective agreement terms of wages, hours and working conditions constitute property of the employees, employed and working thereunder, within the meaning of the Sherman and Clayton Acts, and of Sec. 303 of the Taft-Hartley Act.

First: The decision of the Court below, in holding that "Deprivation of the rights guaranteed by Sec. 7" of the Wagner Act, would have been an unfair labor practice under Sec. 8(1) thereof, and "that the exclusive remedy" [Specification 7] therefor was in proceedings before the Labor Board [R. 215], disregards the significance of the statement that federal rights are "guaranteed" by Section 7, and disregards the allegations in the complaint that petitioners had been unlawfully deprived of their remedy before the Labor Board [R. 31]. Said decision is directly in conflict with the following decisions of this Court:

American Federation of Labor v. Watson, 327 U. S. 582 (66 S. Ct. 761, 90 L. Ed. 973), at 591, where the bill in equity dealt with "a conflict between the Florida law and the National Labor Relations Act," and the right of collective bargaining thereunder, and where the Court held that "since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit 'arising under' a federal law 'regulating commerce.' " (Citing cases.) The opinion is more fully shown in Appendix B (App. p. 27).

Moore v. Illinois Central Railroad Company, 312 U. S. 630 (61 S. Ct. 754, 85 L. Ed. 1089), where it was held that the Court had jurisdiction of the "suit for damages

against respondent railroad company," for the violation of the terms of his collective contract, without requiring the petitioner Moore "to exhaust the administrative remedies granted him by the Railway Labor Act." Appendix B (App. p. 10).

It is also directly in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Gatliff Coal Co. v. Cox* (6 Cir., 1945), 152 F. 2d 52, where the Court held that the plaintiffs there could maintain their action for the differences in the wages due them under their Wagner Act collective agreement, and the amount paid them, as is quoted in Appendix B (App. p. 12).

Second: The decision of the Court below, in holding that "appellants while employed as carpenters, became involved in a jurisdictional dispute with IATSE" [Specification 2], disregards the allegations that the pretended jurisdictional dispute was a sham, conceived and carried out in conspiracy and fraud (App. C pp. 48-51); and

Is directly in conflict with the decision of the Court of Appeals for the Eighth Circuit, in *Amalgamated Ass'n etc. v. Dixie Motor Coach Corp.* (8 Cir., 1948), 170 F. 2d 902, at 906, where it was held that "the pretended labor dispute was in truth the kind of a sham by which the courts never permit themselves to be deceived nor the law to be perverted." The pertinent language of the decision is quoted in Appendix B (App. p. 42).

Third: The decision of the Court below, in holding that petitioners were "in effect, discharged" [R. 205] "on or about September 23, 1946" [R. 211] [Specifications 2, 3, 4], disregards the true intent and effect of the allegations, among other things, that the conspiring employer

defendants met on September 12, 1946, and agreed upon uniform instructions to their officers in charge [R. 22], to request petitioners, and their class, "to leave the premises" and "In the event that such employee asks whether he is being discharged, he should be told 'no' " [R. 88], as is more fully stated in Appendix C (App. p. 50); and

Is directly in conflict with the decision of this Court in *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U. S. 275 (66 S. Ct. 1105; 90 L. Ed. 1230), at 286, holding that "Discharge normally means termination of the employment relationship or loss of a position," and that "in common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment (as was undertaken in the instant case) would hardly be considered as having been 'discharged.' " The pertinent language of the decision is quoted in Appendix B (App. p. 41).

Fourth: The decision of the Court below, in holding that the complaint does not state a cause of action under Section 301 of the Taft-Hartley Act (29 U. S. C. A. 185), on the Court's theory that petitioners, and their class, were "discharged" on September 23, 1946, and that the breach then occurred in its entirety [R. 211] [Specifications 3, 4, 5], disregards the intent and legal effect of the allegations that the actions of the conspiring defendants continued to, through and after the enactment of the Taft-Hartley Act [R. 23, 24, 25].

Is directly in conflict with the decision of this Court in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (17 S. Ct. 540, 51 L. Ed. 1007), which arose from a conspiracy originating prior to the enactment of the Sherman Act. The Court held, at page 341, that

the continuing conspiracy and acts thereunder, subsequent to the enactment of the Act, were governed thereby. The pertinent language of the decision is quoted in Appendix B (App. p. 15); and

Is also directly in conflict with two recent decisions of the Sixth Circuit in:

NLRB v. Local 74, etc. (6 Cir., 1950), 181 F. 2d (Adv.) 126, which cites and follows the foregoing case of this Honorable Court, and applies it to the Taft-Hartley Act, by holding, at page 131, that "Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar." Appendix B (App. p. 16.)

American Federation of Labor v. Western Union Telegraph Co. (6 Cir., 1950), 179 F. 2d 535, which was on appeal from an order of dismissal made by the district court upon the ground that "the Court lacks jurisdiction of the subject matter."

The Court of Appeals "held that the complaint stated a cause of action under both the Labor Management Relations Act and the Federal Declaratory Judgment Act." (App, C, p. 18.)

Fifth: The decision of the Court below, in holding "that the complaint does not allege an act or acts by appellees which are declared unlawful by Sec. 303(a)" of the Taft-Hartley Act, for the reason given by the Court that "a mere threat of a strike or concerted refusal to work made by a union to an employer," such as is alleged in this case, is not actionable under the statute [Specification 6], disregards the text and meaning of Section 303(a), Appendix A (App. p. 3), which makes the acts al-

leged herein unlawful, and of Section 303(b) which gives "whoever shall be injured in his business or property by reason" thereof, a right to "sue in any district court of the United States" (App. A, p. 3); and

Is directly in conflict with the following decisions of this Court:

Duplex Printing Press Co. v. Deering (1921), 254 U. S. 443 (41 S. Ct. 172, 63 L. Ed. 349), at 473, where the Court held that threats of boycott by a labor organization when made to compel employers to yield, were unlawful. The opinion is more fully set out in Appendix B (App. p. 4).

Allen Bradley Co. v. Local Union No. 3 International Brotherhood of Electrical Workers (1945), 325 U. S. 797 (65 S. Ct. 1533, 89 L. Ed. 1939), at 808, where the Court held that "the union's contribution to the trade boycott was accomplished through threats." The opinion is more fully set out in Appendix B (App. p. 26).

International Union United Furniture Workers of America, et al. v. Colonial Hardwood Flooring Co., Inc., 168 F. 2d 33, and *Colonial Hardwood Flooring Co., Inc. v. International Union*, 76 Fed. Supp. 493, uphold Sections 301 and 303 of the Taft-Hartley Act. The opinion is more fully set out in Appendix B (App. p. 43).

Sixth: The decision of the Court below, in holding that appellants while having "a right to press charges of unfair labor practices through specific procedures" and "were not denied that right," that "a hearing was granted" and that "an erroneous finding by a hearing officer is not a deprivation of an equal privilege or immunity" [R. 217] [Specification 8], disregards the allegations that unfair

practice charges were filed with the Labor Board [R. 27], that the charges were referred to a Field Examiner later found to be a long time member of the accused IATSE [R. 28], "that the officers of the NLRB had for a long time had knowledge thereof" [R. 29], that the protests of the complainants was unavailing, and that the charges were dismissed without a complaint being filed as a result of the complainants being denied a fair and impartial hearing thereon [R. 29].

Said decision of the Court below is directly in conflict with the decision of the Fifth Circuit in *National Labor Relations Board v. Phelps* (5 Cir., 1943), 136 F. 2d 562, holding that "when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." The decision is more fully quoted in Appendix B (App. p. 32).

Said decision is also directly in conflict with the decision of the First Circuit in *Lincourt v. N.L.R.B.* (1 Cir., 1948), 170 F. 2d 306, at 307: "As the Act now reads, the General Counsel of the Board 'shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10.' Such administrative determinations by the General Counsel are not denominated 'orders' in the Act, and the Act makes no provision for their review." (App. B, p. 29.)

Seventh: The decision of the Court below, in holding that "the allegations that appellees made misrepresentations to the California Unemployment Commission with the *intent and effect* of wrongfully depriving appellants of

unemployment benefits" as stated in the opinion "because appellees are not alleged to have deprived appellants of rights while acting 'under color of any statute, ordinance, regulations, custom or usage, of any State or Territory' " [R. 218]. The State officials were caused by the conspiring employer respondents to deny persons in petitioners' class full fair open and impartial hearings on their respective claims for unemployment compensation and disability benefits to which they were entitled [R. 32].

Said decision is directly in conflict with both the majority and minority opinions in the decision of said Ninth Circuit, in *Hugh Hardyman, et al. v. Orville Collins, et al.*, No. 12120 (May 1950), ... F. 2d (Adv.) ..... The majority opinion therein holds that the Civil Rights Act, in said Section 47(3) "authorizes a civil suit for damages against private individuals for interfering, pursuant to a conspiracy, with an assemblage of citizens to discuss United States foreign policy and to petition the national government for redress of grievances." The minority opinion cites and follows:

Love v. Chandler, et al. (8 Cir., 1942), 124 F. 2d 785, which held that the State of Minnesota had not discriminated against the appellant there, within the meaning of the law, because he had no absolute right "to have or retain employment by the Works Progress Administration," which distinguishes the *Love* case from the instant case, because petitioners do have a right under law to the unemployment compensation and disability benefits of which they have been deprived. The *Hardyman* and *Love* decisions are more fully stated in Appendix B (App. pp. 21 and 30).

Eighth: The decision of the Court below, in holding that even if "related laws do create a federal right to a fair and impartial hearing for those denied unemployment compensation, that right is enforceable only to the extent of the remedies provided by law for enforcement" [R. 218] [Specification 10], is directly in conflict with the following decisions of this Court:

Ohio Bell Telephone Company v. Public Utilities of Ohio, 301 U. S. 292 (67 S. Ct. 724, 81 L. Ed. 1093), at 304, holding that State Agencies must give fair and open hearings as "one of the 'rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement." The decision is quoted more fully in Appendix B (App. p. 34).

Morgan v. United States, 304 U. S. 1 (58 S. Ct. 773, 82 L. Ed. 1129), at 14, follows said decision in the *Ohio Bell Telephone Company* case *(supra),* with the statement regarding proceedings before Federal Administrative Agencies that "these demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (App. B, p. 32.)

Ninth: The decision of the Court below, in holding that "there is nothing in the allegations to show that appellants were hindered or prevented in any way from pursuing the remedies open to them or that the proceedings on the application for benefits were tainted by conspiracy or fraud" [R. 218] [Specification 11], disregards the allegations of the complaint [R. 32].

Said decision is directly in conflict with the decisions of this Court in said *Ohio Bell Telephone Company* case *(supra)* and *Morgan* case *(supra)*, as cited under the Eighth Point hereof, and with the decision of the Fifth Circuit in *NLRB v. Phelps (supra)* as cited under the Sixth Point hereof.

Tenth: The decision of the Court below, in holding that "another reason why no cause of action is stated under 15 U. S. C. A. Sec. 15 is that no damage to their business or property which stems from a conspiracy in violation of anti-trust laws is alleged" and "The loss of their rights of employment is not a result of any lessening of commercial competition among the studios" [R. 220], disregards paragraph X of the Fourth Count [R. 134], which relates to every allegation of conspiracy in the complaint, as follows:

> "That the conspiracies, and each of them, hereinbefore alleged in the paragraphs adopted from the First Cause of Action, and in this Cause of Action, have been in restraint of trade, and commerce, among the several states, and with foreign nations, within the meaning of the Sherman Act (15 U. S. C. A. 1); and that plaintiffs, and the members of the class for whom they sue, have been injured in their business and property by reason thereof, within the meaning of the Clayton Act (15 U. S. C. A. 15) to their damage as hereinbefore alleged."

The Court disregards the fact that the conspiracy of the defendants was to deprive plaintiffs and their class of their wages, hours and working conditions fixed in their collective agreements, and to subject them to more onerous conditions of employment.

Said decision is directly in conflict with the following cases from other Circuits:

Roseland v. Phister Mfg. Co. (7 Cir., 1942), 125 F. 2d 417 (139 A. L. R. 1013); at 419, holding that "the language of the statute * * * includes any person who shall be injured in his business or property" and includes "the employment or occupation in which a person is engaged to procure a living." (Appendix B, p. 44.)

Dowd v. United Mine Workers, 235 Fed. 1 (C. C. A. 8, 1916), holding that "It is the source of the injury, and not the character of the property injured, which constitutes the test of recovery." (Cert. den. 242 U. S. 653.)

Allen Bradley v. Local Union 3, etc. (*supra*), distinguishing the decision in *Apex Hosiery Co. v. Leader,* 310 U. S. 503, referred to by the Court. This right affects millions of employees.

Eleventh: The decision of the Court below, in holding that *"Schatte v. I. A. T. S. E.,* No. 11,653, reported in 165 F. 2d 216" adopting the opinion of the District Court reported in 70 F. Supp. 1008 "dismissing a complaint filed by many of the same persons" is "decisive as to the same issues presented in the instant case" is directly in conflict with the decision of this Court in: *Smith v. McNeal,* 109 U. S. 426 (3 S. Ct. 319, 27 L. Ed. 986), at 429, that "the question of law upon which the parties are at issue is, whether the judgment rendered February 24, 1877, by which the suit begun December 31, 1873, was dismissed, the dismissal being on the ground that the court had no jurisdiction of the cause of action set out in the declaration, falls within the saving of this section as being rendered on a ground not concluding the plaintiffs' right of action. It is well settled, that judgment of a court dismissing a

suit for want of jurisdiction does not conclude the plaintiff's right of action."

And with the decisions in *Security Realization Co. v. Henderson* (9 Cir., 1941), 120 Fed. 449, at 455, and *In re Hoover Co.*, 134 F. 2d 624, at 628 (30 C. C. P. A.).

The Companion Cases.

Petitions are being concurrently filed in *Studio Carpenters Local No. 946 v. Loew's, Incorporated, a corporation, et al.*, and in *MacKay v. Loew's, Incorporated,* to which reference is made, with the request that the three cases be considered together.

Conclusion.

In conclusion, emphasis is respectfully placed upon the refusal of respondents to bargain on July 3, 1947, subsequent to the enactment of the Taft-Hartley Act [R. 27; App. C, p. 51], and that petitioners barred from the Labor Board had no remedy except by suit.

For the foregoing reasons, it is submitted, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ZACH LAMAR COBB,
Counsel for Petitioners.

July 25, 1950.

APPENDIX A.

LAWS OF THE UNITED STATES.

National Labor Relations Act.

Section 1 (29 U. S. C. A. 151): * * *

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 (29 U. S. C. A. 157): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, for the purpose of certed activities, for the purpose of collective bargaining or other mutual aid or protection."

Labor-Management Relations Act.

Section 1(b) (29 U. S. C. A. Supp. 141(b)): "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Section 7 (29 U. S. C. A. Supp. 157): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 101 (29 U. S. C. A. Supp. 151); re-enacting the provision of Section 1 in the NLRA, with an addition not material here.

Section 301(a) (29 U. S. C. A. Supp. 185(a)): "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any dis-

trict court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—"

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any

other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Duplex Printing Press Co. v. Deering, 254 U. S. 443, at 473-474 (41 S. Ct. 172; 65 L. Ed. 349, at 359-360):

"* * * There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees."

Social Security Act.

Section 301, 42 U. S. C. A. 501. Appropriation.

"For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated * * *."

Section 302, 42 U. S. C. A. 502. Payments to States; computation of amounts.

"(a) The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the

Board under sections 1600-1611 of Title 26, such amounts as the Board determines to be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made. * * *"

"(b) Out of the sum appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a), pay, through the Fiscal Service of the Treasury Department and prior to audit or settlement by the General Accounting Office, to the State agency charged with the administration of such law the amount so certified. * * *"

Section 303, 42 U. S. C. A. 503, upon State laws, provisions required; stopped payments on failure to comply with law.

"(a) The Board shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board under sections 1600-1611 of Title 26, includes provision for—"

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and"

"(b) Whenever the Board, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

"(1) A denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

"(2) A failure to comply substantially with any provision specified in subsection (a);

the Board shall notify such State agency that further payments will not be made to the State until the Board is satis-

fied that there is no longer any such denial or failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State."

Section 405(a), 26 U. S. C. A. 1603(a)(5):

"Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;"

26 U. S. C. A. 1603. Approval of State laws:

"(a) Requirement. The Federal Security Administrator shall approve any State law submitted to him, within thirty days of such submission, which he finds provides that—"

"(4) All money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b): Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;"

Sherman and Clayton Acts.

Section 1 (15 U. S. C. A. 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2 (15 U. S. C. A. 2): "Monopolizing trade a misdemeanor; penalty.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 15 (15 U. S. C. A. 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

LAWS OF CALIFORNIA.

California Unemployment Insurance Act.

California Unemployment Insurance Act 8780d, 3 Deering's California General Laws, Section 56(a), page 3358:

"Sec. 56. Conditions precluding eligibility for benefits.

"An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions:

"(a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

California Administrative Code, Title 22, Social Security, Department of Employment.

"264. (Regulation.) Trade Dispute Disqualification. An individual who is disqualified from receiving unemployment compensation benefits under Section 56 of the Act is also disqualified from receiving disability benefits for the period during which, had he not become disabled, he would have continued to be disqualified under Section 56 of the Act."

APPENDIX B.

Yazoo & M. V. R. Co. v. Webb (5 Cir., 1933), 64 F. 2d 902, at 903:

"(2-5) An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty. As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge. In no other way can confidence and industrial harmony be sustained. But in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. *It is a mutual general offer to be closed by specific acceptances.* When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that *if they serve they will do so under its terms and will join in maintaining them as applied to others. When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed. Ordinarily,* as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer

having the right to discharge at any time and the employee having the right to quit. *But the employment* though indefinite as to time is a relationship while it lasts, and *is subject to the conditions fixed in the working agreement for the industry. Thus a worker cannot be discharged for causes prohibited by the agreement or without a hearing if that is provided, and the agreed seniorities must be observed in promoting, laying off, or re-employing men.*" (Italics added.)

Moore v. Illinois Central Railroad Company, 312 U. S. 630 (61 S. Ct. 754, 85 L. Ed. 1089), at 632:

"Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi state court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded."

And at 634:

"But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act. * * * But we find nothing in that Act which purports to take away from

the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

And at 636:

"The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

Gatliff Coal Co. v. Cox (6 Cir., 1944), 142 F. 2d 876, at 879:

"Appellant alleged in paragraph 1 of its answer that the court was without jurisdiction of the subject matter of appellee's cause because appellee had no justiciable rights under the bargaining agreement between the coal operators' association and the labor organization * * *"

And at 880:

"* * * It is a mutual, general offer to be closed by acceptance. When the collective agreement is signed by the individual members of the employers' association and the collective bargaining agent of the labor organization, no other contract being shown, it becomes, until abrogated, the rule of the individual employer and any person who thereafter continues in the employment of the employer or takes new employment with him becomes entitled to all benefits of the collective agreement and incurs all of its obligations." (Citing cases.)

Since appellee was employed by appellant at the time the collective agreement was entered into between the Southern Appalachian Coal Operators' Association and District No. 19, United Mine Workers of America and he thereafter continued in the employ of appellant and

there being no showing that he made any individual contract conflicting with the collective agreement, appellee's rights arising out of his employment by appellant and the wages due him, if any, must be measured by the collective agreement. Appellee had the right under the circumstances here appearing to maintain the present action.

Gatliff Coal Co. v. Cox (6 Cir., 1945), 152 F. 2d 52, adopts the decision of the District Court, and at 52:

"These actions involve common questions of law and similar issues of fact. By agreement of the parties, for the purpose of trial, these were consolidated and tried by the Court without the intervention of a jury."

And at 53:

"* * * The plaintiffs were employed by defendant in operating its power house which furnished the power for the operation of all the mines, plaintiff Maynard Cox being an engineer and Ora L. Jones a fireman. Cox's employment covered the period from April 1, 1941, to and including March 31, 1943, and Jones worked from April 1, 1941, to and including June 30, 1942.

"Prior to April 1941, the defendant's employees were unorganized and defendant's mines were operated under a non-union open shop policy. During early April 1941 the employees were organized and plaintiffs, along with other employees, became members of the miners' union known as District 19, United Mine Workers of America, which will be hereinafter referred to as the Union. * * *"

"The participants in the wage conference at Washington, recognizing the fact that negotiations as to the new collective agreement would be prolonged, and desiring to promote the National defense program by ending the pend-

ing strike, on April 30, 1941, entered into a temporary agreement to be effective during the negotiations and until final conclusion of a new agreement. * * *"

And at 55:

"According to a transcript from defendant's books filed in the record which, pursuant to an order made at pre-trial conference, is accepted by the parties as correct, at the hourly rate for regular time and overtime as provided in the District Agreement, the plaintiff Maynard Cox earned a total of $4285.35 for regular time and a total of $5862.17 for overtime, for which defendant paid him only $1597.43 on account of regular time and $2181.63 on account of overtime.

"According to the same records, at the hourly rate for regular time and overtime, as provided in the District Agreement, the plaintiff Ora L. Jones earned a total of $2245.34 for regular time and a total of $2389.39 for overtime, for which defendant paid him only $1058.89 on account of regular time and $1105.33 on account of overtime.

"The payments so made to the plaintiffs, while substantially below the rates provided by the District Agreement, were more than the minimum rates required by Section 6 of the Fair Labor Standards Act (29 U. S. C. A. sec. 206) for regular time and included one and one-half thereof for overtime.

"The plaintiffs seek judgment for the balances due them, respectively, under the terms of the District Agreement * * *"

And at page 56:

"(1) During the period involved in this litigation, the rights and duties of the parties as employer and employees

were subject to the provisions of the 'National Labor Relations Act' (29 U. S. C. A. Secs. 151-166) * * * and in so far as these Acts of Congress are pertinent to the issues here involved they are controlling.

"The so-called 'District Agreement' was a valid collective bargaining agreement within the meaning of the National Labor Relations Act and is entitled to the protection which it affords.

"(2) *In utilizing collective bargaining agreements* to implement a National labor policy designed to remove certain recognized sources of industrial strife by encouraging friendly adjustment of industrial disputes as to wages, hours of work and other conditions of employment, upon a plane of equality of bargaining power between employers and employees, *the National Labor Relations Act, in the public interest, has given such collective bargaining agreements a more secure and stable position in our National economy than that of ordinary common law contracts* which may be altered at pleasure *by rendering ineffectual* and unavailable *any collateral agreements* between individual members of the collective bargaining group *designed to obtain a diminution of the obligations* of a particular employer *or abridgment of the benefits accruing to* particular *employees under the collective agreement,* regardless of the circumstances that may be relied upon to justify them or the terms there. *To hold otherwise '* * * would reduce the National Labor Relations Act to a mere futility and leave collective agreements no stronger than the weakest members of the union.'* J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762. Statutes requiring collective bargaining would have little substance if what was made collectively could be promptly unmade individually. Order of

Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 346, 64 S. Ct. 582, 88 L. Ed. 788. (Italics added.)

"(3) The Act also contemplates that a collective bargaining agreement be in writing. * * *"

"(4) It thus appears that the National Labor Relations Act clearly precludes defendant's reliance upon the prior or contemporaneous oral agreement upon which its defense to these actions is based.

"(5) *I am of the opinion that the wages, hours of work and conditions of employment of both plaintiffs,* during the period of their respective employments by defendant here involved, *were governed by the written collective bargaining agreements,* which defendant signed, *and that* by accepting semi-monthly payments of less amount than the wages provided by the written collective agreement, *they* are not estopped to claim the balance due them thereunder, but *are entitled to judgment for such balance."* (Italics added.)

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (17 S. Ct. 540, 51 L. Ed. 1007), at the pages indicated:

"On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled 'An Act To Protect Trade and Commerce against Unlawful Restraints and Monopolies.'" (p. 291.)

"On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill, made and entered into an agreement by which they formed themselves into an association to be known as the 'Trans-Missouri Freight Association,' and they agreed to be

governed by the provisions contained in the articles of agreement." (p. 292.)

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract that the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provision of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise." (p. 342.)

National Labor Relations Board v. Local 74 Etc. (6 Cir., 1950), 181 F. 2d (Adv.) 126, at 127:

"The National Labor Relations Board seeks enforcement of its order directing Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and its

business agent, Jack Henderson, to 'cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store.'

"The authority for issuance of the Board's order is rested upon the following provisions of section 8(b) (4) (A) of the Labor Management Relations Act of 1947, * * *"

And at 131:

"(5) The respondents contend that their decision taken during working hours on August 21 to discontinue work at Stanley's residence in accordance with the working rules and practices of the union was a concerted decision not to return to work the next day, and that therefore, inasmuch as section 8(b) (4) (A) did not become effective until the following day (August 22), the section has no application and the Board lacked jurisdiction to enter the order which it did. Much reliance is placed upon the decision of United States District Judge Darr, who, in denying a temporary injunction sought by a regional director of the National Labor Relations Board to restrain the respondent union from maintaining a secondary boycott against the Ira A. Watson Company, said that in his judgment 'the whole employment relationship ceased to exist on August 21, 1947, and that when the Act became effective there was no unlawful situation'; and that the whole incident was closed."

And at 131:

"Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar. In Jefferey-De Witt Insulator Co. v. National Labor Relations Board, 4 Cir., 91 F. 2d 134, 112 A. L. R. 948, certiorari denied 302 U. S. 731, 58 S. Ct. 55, 82 L. Ed. 565, it was held that the mere fact that a labor dispute began before the enactment of the National Labor Relations Act does not have the effect of withdrawing either the parties or the dispute from the regulatory power of Congress as to subsequently occurring acts. As early as 1897, the Supreme Court applied the same principle in holding that an agreement to establish and maintain future rates for transportation, though lawful when made, constituted a violation of the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1 *et seq.*, when continued in operation after certain provisions of the agreement became unlawful in consequence of the Sherman Act. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007." (Italics added.)

American Federation of Labor v. Western Union Telegraph Co. (6 Cir., 1950), 179 F. 2d 535:

"Action by American Federation of Labor against the Western Union Telegraph Co. for alleged breach of collective bargaining agreement for a declaratory judgment.

"The United States District Court for the Northern District of Ohio, Eastern Division, Paul Jones, J., dismissed the action for want of jurisdiction and the plaintiff appealed.

"The Court of Appeals, Martin, Circuit Judge, held that the complaint stated a cause of action under both the Labor Management Relations Act and the Federal Declaratory Judgment Act."

And at 536:

"At the outset, it should be observed that jurisdiction is not rested upon diversity of citizenship. In its first numbered paragraph, the complaint asserts that jurisdiction of the United States District Court is based on section 301 of the Labor Management Relations Act, 1947, * * *"

"(1) It is well settled that a motion to dismiss for failure to state a claim should not be granted, unless it appears certain that the plaintiff would not be entitled to relief under any set of facts proved in support of his claim as stated. * * *

"The complaint alleges that appellant and appellee entered into two collective bargaining agreements in writing, effective respectively as of April 1, 1946, and April 1, 1947. Both agreements, in material part annexed as exhibits to the complaint, fix the terms and conditions of employment of all employees of appellee within the bargaining unit, including employees in the Cleveland office. The Agreement of April 1, 1947, has by mutual agreement been amended from time to time in certain respects not germane to this proceeding. *In both collective bargaining agreements, it is expressly provided that, during the life of the agreement, the Western Union Telegraph Company will not abandon or modify its existing Benefit and Pension Plan, except pursuant to mutual agreement.* * * *"

And at 537:

"The complaint charges that despite the fact that Mae Hart was fifty-five years, five months and fourteen days of age, with a service record in the employ of Western Union of twenty-one years and eleven and one-half months, and so qualified for a Class A pension under the provisions of the Benefit and Pension Plan, she was on April 30, 1946, illegally and improperly removed from the rolls of the appellee company as an employee and refused further employment for a class A pension. It is alleged that Mae Hart is ill, destitute and dependent upon charity and contributions from friends and relatives for the necessities of life, because of the illegal and improper refusal of appellee to pay the pension to which she is entitled; and that she has sustained both mental and physical suffering as the result of the illegal refusal of the appellee to comply with its contractual obligations to her and to the American Federation of Labor.

"The complaint asserts that Western Union denies that it has violated its contract or the provisions of the pension plan, that it claims justification in refusing to pay Mae Hart a Class A pension on the grounds that she was not on the active rolls of the company on April 30, 1946, when her Class D or sickness disability pension expired and that, in any event, the Pension Committee had uncontrolled discretion to refuse her or any other employee a pension on any grounds whatsoever. * * *"

And at 537:

"The prayer of the complaint is that the court entertain the action and enter judgment declaring that Mae Hart is entitled to a Class A pension effective May 1, 1946, making her whole for injuries suffered because of

the illegal actions of the defendant; that the court permanently enjoin the defendant from 'in any manner breaching and violating the provisions of said pension plan insofar as it affects Mae Hart or any other employee represented by the plaintiff'; and that the court grant such other and further relief as it deems just.

"(2) We are of opinion that the complaint clearly states a cause of action of which the United States District Court has jurisdiction. The action is one for violation of contract between appellant and appellee within the express provisions of section 301(a) of the Labor Management Relations Act of 1947; * * *"

Hugh Hardyman, et al., v. Orville Collins, et al. (9th Cir.), No. 12120, decided May 29, 1950, ... F. 2d .....:

"The trial court entered a judgment of dismissal of an amended complaint on the ground that it did not state a cause of action for damages under §47(3) of Title 8, U. S. C. A. * * *"

"In short, the question presented is whether §47(3) authorizes a civil suit for damages against private individuals for interfering, pursuant to a conspiracy, with an assemblage of citizens to discuss United States foreign policy and to petition the national government for redress of grievances. This broad question embraces three issues: 1. Did Congress intend to create such a civil action by the enactment of §47(3)? 2. If so, did Congress have constitutional power to do so? 3. Granted the constitutional power, is the statute a proper exercise thereof? We deal with the questions in the order named."

"The District Court concluded that the statute was intended to give a remedy for deprivation of rights only by

persons acting under color of state law. We think it embraces the deprivation of federal rights by private individuals and that such is the interpretation given the statute by the Supreme Court of the United States.

"We conclude that Congress has the constitutional power to protect against invasion of federal rights by private individuals. Congress has exercised that power by enacting §47(3). The allegations of the complaint are sufficient to invoke the provisions of said section.

"There exists an understandable reluctance to open the doors of federal courts for the redress of grievances inflicted by one set of individuals upon another lest those courts be flooded with actions that should properly be left to the states. We do not think the narrow compass of federally protected rights set up in §47(3) will permit of such a result. If it does, and the load becomes too burdensome, it then becomes a matter with which the congress must deal.

"Judgment of dismissal reversed."

Bodinson Mfg. Co. v. California Employment Commission, 17 Cal. 2d 321, at pages indicated (italics ours):

"* * * It is true that under the proper construction of the statute an employee who is prevented from working through no act of his own is entitled to compensation as, for example, where he is barred by force from the premises where he has been working. * * *" (p. 327)

"In brief, disqualification under the act depends upon the fact of voluntary action, and not the motives which led to it. The legislature did not seek to interfere with union principles or practices. The act merely sets up certain conditions as a prerequisite to the right to receive

compensation, and declares that in certain situations the worker shall be ineligible to receive compensation. *Fairly interpreted, it was intended to disqualify those workers who voluntarily leave their work because of a trade dispute* * * *" (p. 328)

Bunny's Waffle Shop v. California Employment Commission, 24 Cal. 2d 735, at 739 (italics ours):

"(1) *The commission's decision apparently is based upon the conclusion that the leaving of work was not voluntary, but it also found that the leaving was attributable to the employers' changes in wages and conditions of work,* to continue in effect until the unions would negotiate with them. *Petitioners* do not question this finding but *contend that their acts were but an additional step in a trade dispute, and that* when *claimants* left their work because of such acts, they *left because of a trade dispute* and are therefore not eligible for benefits. *This reasoning fails to distinguish between leaving in the course of a trade dispute and leaving because of a trade dispute. The act* does not disqualify an employee from receiving benefits in all cases where his unemployment results directly or indirectly from a labor dispute, but *makes him ineligible only if he left his work because of the dispute.* There must therefore be a direct causal connection between the trade dispute and the leaving of work. It is conceded that when claimants ceased working, a trade dispute between the unions and employers was in active progress, but this fact alone does not necessarily establish that the leaving was because of the trade dispute. The commission found that the *leaving was caused by the reduction in wages and the changed conditions of work,* which the employers declared would continue in effect until the unions agreed to negotiate with them."

"* * * *When the new conditions of work were finally announced by the employers, they were not offered as bona fide proposals* for the continued operation of the employers' places of business, but were imposed for the sole purpose of coercing the unions into bargaining collectively with the employers' representative and were to continue only until the unions agreed to do so. *Admittedly they were an economic weapon designed to compel compliance with the employers' demands,* and when claimants left their work, they left because of this economic weapon and not because of the trade dispute then in existence. *The fact that the trade dispute was unquestionably the motivating cause of the employers' acts does not establish any direct causal relation between the dispute and the employees' leaving of work."* (p. 740)

"* * * *The economic weapon in the present case was created by the employers and directed against their employees, and it alone,* rather than the trade dispute that occasioned it, *was the cause of the leaving of work."* (p. 742)

McKinley v. California Emp. etc. Com., 34 A. C. 299, at the pages indicated (italics ours):

"Provisions disqualifying from benefits an employee whose unemployment is the result of a labor dispute are to be found in the unemployment compensation statutes of all of the 48 states. In most jurisdictions, however, the Legislature has made certain exceptions to the general disqualification provision. (49 Columb. L. Rev. 550 [1949].) Lack of such express statutory exception in the California act led this court in *Bodinson Mfg. Corp. v. California Emp. Com.,* * * * to state that *disqualification 'depends upon the fact of voluntary action' by the claimant.* That decision recognized the obvious legisla-

tive intent that persons who are involuntarily and innocently out of work as the result of a labor dispute should not suffer by loss of unemployment benefits. *Accordingly, the right to benefits under section 56 of the statute was said to depend upon whether the worker left his job of his own free will or was forced to do so because of the acts of others.*" (p. 302).

"'* * * If the other employers thereupon choose to close their establishments and lock out their employees, such employees cannot be charged with leaving their work because of a trade dispute.' (24 Cal. 2d 741)" (*The Bunny's Waffle Shop* case.) p. 305)

The concurring opinion by Mr. Justice Schauer states at page 305:

"* * * I am satisfied that unless Bunny's case is to be squarely overruled no result other than that reached by Justice Edmonds can fairly and consistently be reached.

"In Bunny's case there was no literal shutdown or lockout. A trade dispute had arisen; the employers, who theretofore had not, as among themselves, bargained collectively with the union (see p. 736 of 24 Cal. 2d), demanded collective bargaining with their newly formed association (as stated at p. 737, they 'wished to negotiate a single contract') and, as an alternative, announced that upon continued refusal to negotiate with their association wages would be reduced and certain working conditions changed. The employes refused to accede to either alternative and walked out. But their walkout was held not to be voluntary and *the concerted act of the employers was held* (see p. 739 of 24 Cal. 2d) *to be 'tantamount to a lockout.'*"

The disenting opinion of Mr. Chief Justice Gibson states, at page 312:

"It is conceded that the right to benefits depends upon whether the worker left his job of his own free will or was *forced* to do so because of the acts of others and that under the Bodinson case section 56 disqualifies only those workers who *voluntarily* leave their work (Citing *Bodinson* case.) Thus, although the section clearly precludes the payment of benefits to employees who go out on strike (citing cases), *it has been treated as not generally disqualifying workers who are locked out by their employers.* (Citing *Bunny's Waffle Shop* and *Bodinson* cases.) *It would be a contradiction in terms to hold that a locked-out employee had voluntarily left his work.*"

Allen Bradley Co. v. Local Union No. 3 (supra), at page 798:

"The question presented is whether it is a violation of the Sherman Antitrust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."

And at 800:

"Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries."

"* * * All of this took place, as the Circuit Court of Appeals declared, 'through the stifling of competition,' and because the three groups, in combination as 'co-partners,' achieved 'a complete monopoly which they used

to boycott the equipment manufactured by the plaintiffs.' Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed."

"Quite obviously, this combination of business men has violated both Secs. (1) and (2) of the Sherman Act, unless its conduct is immunized by the participation of the union."

And at 807:

"For the union's contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from local manufacturers the union laborers would terminate the 'relation of employment' with them and cease to perform 'work or labor' for them; and through their 'recommending, advising, or persuading others by peaceful and lawful means' not to 'patronize' sellers of the boycotted electrical equipment." (Italics ours.)

"* * * We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act."

American Federation of Labor v. Watson, 327 U. S. 582, at 591, 90 L. Ed. 873, at 878:

"* * * We do not pass on the question whether the District Court had jurisdiction under Sec. 24(1) or Sec. 24(14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in Sec. 24(8) of the Judicial Code, 28 U. S. C. A. Sec. 41(8), 7 F. C. A., Title 28, Sec. 41(8) which grants the federal district courts jurisdiction of all 'suits and proceedings arising under any law regulating commerce.' As we have said, the bill alleges a conflict between the

Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit 'arising under' a federal law 'regulating commerce.'"

Deitrick v. Greaney, 309 U. S. 190, at 196, 84 L. Ed. 694, at 699:

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. * * *"

Hague v. C. I. O., 307 U. S. 496, at 512, 83 L. Ed. 1423 at 1435:

"The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Sec. 1 of the Fourteenth Amendment; and whether Rev. Stat. Sec. 979 and Sec. 24(14) of the Judicial

Code. 28 U. S. C. A. Sec. 41(14) afford redress in a federal court for such abridgment. * * *

"Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.

"The National Labor Relations Act declares the policy of the United States to be to remove obstructions to commerce by encouraging collective bargaining, protecting full freedom of association and self-organization of workers, and, through their representatives, negotiating as to conditions of employment.

"Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under Sec. 24(14)."

Lincourt v. N. L. R. B. (1st Cir.), 170 F. 2d 306, 307:

"As the Act now reads, the General Counsel of the Board 'shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10.' Such administrative determinations by the General Counsel are not denominated 'orders' in the Act, and the Act makes no provision for their review."

Love v. Chandler et al. (8 Cir., 1942), 124 F. 2d 785:

"Action by Harold R. Love against Loye W. Chandler and others, each individually, for damages allegedly resulting from conspiracy of defendants to prevent plaintiff from having and holding employment under the Works Progress Administration. From a judgment of dismissal. the plaintiff appeals.

Affirmed."

And at 787:

"(3) The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that he had no absolute right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegely suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. Compare *Hodges v. United States,* 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65; *Carter v. Greenhow,* 114 U. S. 317, 330, 5 S. Ct. 928, 962, 29 L. Ed. 202, 207. We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked."

Mark Hopkins, Inc. v. Cal. Emp. Com., 24 Cal. 2d 744, at 748:

"(1) Section 56(a) * * * provides that 'An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him . . . (a) *If he left his work* because of a *trade dispute* and for the period during which he continues out of work by reason of the fact that the *trade dispute* is still in active progress in the establishment in which he was employed.'

"A claimant is thus ineligible for benefits if the *trade dispute* is the direct cause of his continuing out of work.

"If a claimant *who leaves his work* because of *a trade dispute* subsequently obtains a permanent full-time job, however, he is no longer out of work and the continuity of his unemployment is broken. If he loses his new job for reasons unrelated to the dispute, he is unemployed by reason, not of the *trade dispute*, but of the loss of the new employment.

"(2) The termination of a claimant's disqualification by subsequent employment thus depends on whether it breaks the continuity of the claimant's unemployment and the *trade dispute*. Such employment must be bona fide and not a device to circumvent the statute." (Italics ours.)

And at 749:

"(4) Mere temporary or casual work does not sever this relationship, for it does not effectively replace the former employment. The worker expects its termination and does not look forward to that continuity of work and income that characterizes permanent employment.

"(5) Similarly, part-time employment of a claimant does not break the causal relation between the *trade dispute* and his unemployment." (Italics ours.)

Morgan v. United States, 304 U. S. 1, at 14; 82 L. Ed. 1129, at 1130, in an opinion by the late Mr. Chief Justice Hughes, deals with the Fifth Amendment in its relation to federal administrative action, but is applicable here. The opinion states, at 1130:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail can not be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a *quasi*-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'— essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'." (Citing said *Ohio Bell Telephone.*)

National Labor Relations Board v. Phelps, 136 F. 2d 562, at 563:

"(1-4) The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any dif-

ference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.*

"It remains only to inquire whether the record sustains the charge of partiality and prejudice on the part of the trial examiner, a functionary having substantially the same relation to the Board that a special master has to a court of equity. Respondents say that it does, the board denies this. This is the charge. Appointed as examiner to conduct the hearing on a complaint following a charge against Phelps, as Trustee of Atlas Pipe Line Corporation, the examiner forsook his role as an impartial hearer and trier of facts, and taking on the double role of investigating accuser and espousing prosecutor, a role which the Board has not conferred, indeed, could not confer upon him as examiner, went into vigorous action as prosecution manager, and in that role did, or caused to be done, these things. *Upon the false pretense that he wished to complete the record made in the cause against Phelps, Trustee, he secured a stipulation for use in prosecuting Atlas Oil and Refining Corporation.* Immediately

upon its receipt, he directed that the stipulation be received and entered as an exhibit in the pending cause, and brought the matter to the attention of the Board and the chief trial examiner. *He caused the chief trial examiner to order the hearing reopened for the purpose of making Atlas Oil & Refining Corporation a respondent in the proceeding and to continue Denham as trial examiner.* Though no charge had been made against Atlas and the filing of a charge must precede a complaint, *Denham of his own motion issued an order to show cause* why Atlas should not be made a party, and the complaint amended so as to charge it with offenses under the act. *The proceedings having gone forward over* the objections of the trustee and Atlas, and their *motions to disqualify him, the examiner exhibited resentment and spleen toward them and gave expression to his pre-determined opinion of their guilt on the charges he was supposed to be trying.*"

Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 U. S. 292, in an opinion by the late Mr. Justice Cardozo, at 304 (67 S. Ct. 724, 81 L. Ed. 1093, at 1101):

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. (Citing cases.) Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (citing cases) of a fair and open hearing be maintained in

its integrity (citing cases). The right to such a hearing is one of 'the rudiments of fair play' (citing cases) assured to every litigant by the Fourteenth Amendment as a minimal requirement (citing cases). There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, at 390, 82 L. Ed. 319, at 321, covers the jurisdiction of the three-judge court:

"This is an appeal from a final decree of the District Court, composed of three judges (28 U. S. C. A. Sec. 380), permanently enjoining an order of the Railroad Commission of the State of California."

And at page 391, and L. Ed. page 321:

"* * * Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. * * *"

Screws v. United States, 325 U. S. 91 (65 S. Ct. 1040; 89 L. Ed. 1495; 162 A. L. R. 1330), at 111:

"* * * We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are in-

cluded whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea."

United Steel Workers of America, et al. v. Shakespeare Co., et al., 84 Fed. Supp. Adv. 267:

"Action by United Steel Workers of America (U. S. A.-C. I. O.), *and others* (later identified as members) against the Shakespeare Company and others *for a judgment determining rights of parties under a collective bargaining agreement*, for a determination that defendants had wrongfully terminated the agreement *and for damages. On motion to dismiss the complaint. Motion denied.*" (Italics ours.)

And at 269:

"The strained relations between these parties continued, and on November 16, 1948, *plaintiff union and representatives and members of the union* filed complaint against defendants in the present suit. *They allege*, among other things, *that the collective-bargaining agreement* of July 16, 1947, *had not been legally terminated* by defendants * * *." (Italics ours.)

And at 270:

"(1) It should be kept in mind that in their amended complaint *plaintiffs do not ask for injunctive relief* against so-called unfair labor practices or for any other form of injunctive relief. *They ask* only for a determination of their rights under the collective-bargaining agreement in question and *for a determination of their damages* claimed to have been *sustained as a result of defendants' alleged*

violation of the agreement. (Italics ours.) Plaintiffs' amended complaint and their claim of jurisdiction are based on Title III, Sec. 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A. Sec. 185(a), * * *

"The defendants cite and rely upon the cases of Amazon Cotton Mill Co. v. Textile Workers Union, 4 Cir., 167 F. 2d 183, and *International Longshoremen's & Warehousemen's Union v. Sunset Line & Twine Co.,* D. C. 77 F. Supp. 119, as supporting their contention that this court is without jurisdiction of the present case. *However, in those cases the plaintiffs asked for injunctive relief,* and the courts correctly held that proceedings to enjoin *unfair labor practices were within the exclusive jurisdiction* of the National Labor Relations Board, and that a Federal district court did not have jurisdiction to enjoin unfair labor practices. *Furthermore, those cases did not involve alleged violation of collective-bargaining agreements and, therefore, were not within the purview of Section 301(a)* of the Labor Management Relations Act. The theory on which those cases were based, and the factual situations involved, clearly distinguish them from the present case." (Italics ours.)

And at 271:

"It is elementary that in considering a motion to dismiss the court must assume the truth of all material and well-pleaded allegations of fact. The amended complaint alleged numerous acts of violation of the collective-bargaining agreement by defendants prior to October 9, 1948, and, assuming the truth of those allegations, the court concludes that the amended complaint states a claim upon which relief could be granted."

And at 272:

"In summary, the court concludes:

"(1) That it has jurisdiction of the matters alleged in plaintiffs' amended complaint; and

"(2) That, assuming the truth of all material and well-pleaded allegations of fact, the amended complaint states a claim upon which relief could be granted.

"Defendants' motion to dismiss the amended complaint is accordingly denied."

United Electrical, R. & M. Workers v. Baldwin, 67 Fed. Supp. 235, at 239:

"(1-3) The Court has jurisdiction to entertain the action. The rights of free speech and assembly under the First Amendment are privileges of citizens of the United States, guaranteed against state infringement by the Fourteenth Amendment. The rights to due process of law and equal protection of the laws are guaranteed not only to citizens but to any person. Remedy for deprivation of these rights is provided by the Civil Rights Act, Title 8 U. S. C. A. Sec. 43, jurisdiction over the enforcement of which is given the District Courts by Section 24(14) of the Judicial Code, Title 28 U. S. C. A. Sec. 41(14). Snowden v. Hughes, 1944, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497; Hague v. C. I. O., 3 Cir., 1939, 101 F. 2d 774, 790; Douglas v. City of Jeannette, 1943, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324; Burt v. City of New York, 2 Cir., 156 F. 2d 791.

"(4) The individual plantiffs as citizens of the United States are proper parties. The plaintiff unions, voluntary associations of individuals, are also proper parties to conduct the suit in a representative capacity in the interest of

their members. Rule 17(b), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; Hague v. C. I. O., *supra;* International News Service v. Associated Press, 1918, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293.

"(5) A conspiracy to discourage collective bargaining is a deprivation of the rights secured by the Wagner Act, and therefore also a basis of suit under the Civil Rights Act and Section 24(14) of the Judicial Code referred to above. Suit to restrain such a conspiracy also falls within the jurisdiction of the Court under 24(8) of the Judicial Code, as a suit under a law regulating commerce, under the reasoning of American Federation of Labor v. Watson." (327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, at 878).

Wilson & Co., Inc. v. United Packing House Workers, 83 Fed. Supp. 162, at 163:

"Action by Wilson & Company, Inc., against United Packinghouse Workers of America, *a labor organization* affiliated with the Congress of Industrial Organizations, * * * *for damages for breach of collective bargaining contrast,* wherein the United States intervened. *On motion by defendant unions to dismiss for want of jurisdiction. Motion denied."* (Italics ours.)

And at 164:

"Plaintiff alleges that it is engaged in a business affecting commerce and that the defendants are labor organizations and voluntary unincorporated associations representing employees in an industry affecting commerce and have officers and agents engaged in such representation in this district. *The defendants are alleged to have breached the*

terms of the agreement by causing strikes and work stoppages in March of 1948 in certain of plaintiff's plants located in New York." (Italics ours.)

"Jurisdiction is invoked under Section 301(a) of the Labor Management Relations Act, 1947, * * * *and under 28 U. S. C. A. Sec. 1337,* which provides that 'the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." (Italics ours.)

"(1) *First. It is contended by defendants that Section 301(a) is unconstitutional as applied to this case,* * * *.

"Defendants argue that the action is one for breach of contract, to enforce a right existing under the common law of the State of New York; that there is no diversity of citizenship, and the case is not one arising under the Constitution or laws of the United States or upon any other ground set forth in Article III, Section 2 of the Constitution. Consequently, runs the argument, Congress was without power to confer jurisdiction over the case on the District Court. (Citing cases.) *The argument must fail."* (Italics ours.)

And at 165:

"* * * Section 301 (a) of the Act, authorizing suits for violation of such agreements, would be meaningless on any other hypothesis and would attribute to Congress the anomalous action of providing for remedy and a forum in which to enforce it, without creating a right to remedy or to enforce. The very inclusion of Section 301 shows, on its face, and the legislative history of the Act confirms the Congressional intention, that other provisions of the Act, for redressing unfair labor practices,

were not an exclusive statement of the rights created by the Act, and did not eliminate or militate against the right to seek relief in the federal courts for violations of collective bargaining agreements between employers and labor organizations."

"* * * *The Labor Management Act creates important substantive rights* between employers and *employees* engaged in interstate commerce, and section 301 expressly authorizes suits of this character in district courts of the United States. It is clearly, therefore, a suit arising under a law of the United States." (Italics ours.)

And at 166:

"* * * In view of the fact that the enforcement of a federal right is involved in the instant case, the argument falls. It is clear that *Congress, having created a substantive right* in the exercise of its power under the commerce clause, art. 1, sec. 8, Cl. 3, *may also provide the procedure for enforcing that right by making voluntary labor organizations legal entities for the purpose of suit. United Mine Workers of America v. Coronado Coal Co.,* 259 U. S. 344, 383-392, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; *cf.* Rule 17(b) of the Federal Rules of Civil Procedure. Insofar as state laws may conflict, they must yield to the paramount congressional legislation when a federal right is asserted as the basis of suit." (Italics ours.)

Fishgold v. Sullivan Drydock and Repair Corporation, 328 U. S. 275 (66 S. Ct. 1105, 90 L. Ed. 1230), at 286:

"Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been

laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been 'discharged.' There are three terms used in Sec. 8(c) which relate to various types of cessation of work—a 'furlough,' a 'leave of absence' and a discharge. A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions. * * *"

Amalgamated Ass'n, etc. v. Dixie Motor Coach Corp. (8 Cir., 1948), 170 F. 2d 902, at 906:

"(1) We recognize that the proceedings in the Wagshal case before the Supreme Court required the court to affirm the dismissal of an appeal by the Court of Appeals for the District of Columbia, 161 F. 2d 380, and that the ultimate effect of its order of affirmance was to permit an injunction *pendente lite* against a labor union and others issued at the instance of a private party to remain in effect. That result came about because the pretended labor dispute was in truth the kind of a sham by which the courts never permit themselves to be deceived nor the law to be perverted. In the particular respect of the sham character of the labor dispute the Wagshal case is in contrast with the genuine controversy over wages and working conditions here involved. * * *"

International Union United Furniture Workers of America, et al. v. Colonial Hardwood Flooring Co., Inc., 168 F. 2d 33, affirms the following District Court ruling.

Colonial Hardwood Flooring Co., Inc. v. International Union, 76 Fed. Supp. 493, like the present case dealt with two counts, under Sections 301 and 303, respectively, and at page 494, states:

"The complaint in this case is in two counts. Count 1 is based on section 301 of the recent Act of Congress known as the Labor Management Relations Act, * * *

"Section 301(a) authorizes suits for violation of contracts between employer and the labor organization representing employees * * *.

"The complaint alleged that contrary to the express provision of the contract on or about October 3, 1947, the defendants caused a strike or stoppage of work at the plaintiff's furniture plant in consequence of which it sustained substantial damages."

And at 495:

"Count 2 of the complaint is based on section 303 of the Labor Management Relations Act, 29 U. S. C. A. Sec. 187, which, shortly stated, prohibits secondary boycotts. The count alleges the occurrence of a secondary boycott by the defendants with consequent substantial damage to the plaintiff's business * * *.

"* * * The defendants separately have filed motions to dismiss the complaint on many separate grounds. They will be considered separately and briefly at this time."

And at 496:

"(5) The defendants also raise various constitutional questions. First it is said that the court is without jurisdiction of the case in the absence of diversity of citizenship. * * * The Labor Management Act creates important substantive rights between employers and employees engaged in interstate commerce, and section 301 expressly authorizes suits of this character in district courts of the United States. It is clearly, therefore, a suit arising under a law of the United States.

"(6) The constitutionality of section 301 is also challenged on the ground that it violates the due process clause of the Fifth Amendment in its alleged retrospective operation on contracts existing prior to the passage of the Act. But in my opinion the Act is prospective and not retrospective in character. It is not retrospective merely because it gives additional remedies for the future breach of then existing contracts.

"(7) The same constitutional objection is urged as to section 303 of the Act but is equally untenable, at this stage of the case."

Roseland v. Phister Mfg. Co., 7th Cir., 1942, 125 F. 2d 417 (139 A. L. R. 1013), at 419:

"*The language of the statute* (Clayton Act, Sec. 4; 15 U. S. C. 15) * * * *includes any person who shall be injured in his business or property.* * * * In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit,—persistent human efforts which have for their end pecuniary reward. It denotes 'the employment or occupation in which a person

is engaged to procure a living.' Allen v. Commonwealth, 188 Mass. 59, 74 N. E. 287, 288, 69 L. R. A. 599." (Italics ours.)

The language of Section 303(b) is manifestly taken from the language in the Clayton Act, so that the same rule necessarily applies. (*Infra.*)

"Whoever shall be injured * * * may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy" places no restriction upon plaintiffs' jurisdiction in this case for two reasons:

(a) Because plaintiffs, and their class, have jurisdiction in the federal court under Section 301 (*supra*, pp. 31, 36, 38); and

APPENDIX "C."

STATEMENT SUPPLEMENTING COURT'S STATEMENT OF CASE.

The Collective Contracts:

The Exhibit "A" jurisdictional agreement of July 9, 1921, between plaintiffs' United Brotherhood of Carpenters and the IATSE, settling the jurisdictional division of work between the two crafts [R. pp. 11, 36], *with the allegation that this contract has never been terminated.* [R. p. 12.]

The Exhibit "B-1" basic agreement of November 29, 1926, between the employer defendants and both plaintiffs' Brotherhood of Carpenters and said IATSE, while the Exhibit "A" jurisdictional agreement was in operation, and the Exhibits "B-2" to "B-8" extensions, renewals and enlargements thereon [R. pp. 12-14, 41-54], *including the Exhibit "B-6" closed shop agreement* [R. pp. 13, 52], *also made while said Exhibit "A" jurisdictional agreement was in operation,* and the agreements on mechanics wage scale and working conditions referred to in said Exhibit "B-8", which provided for a six hour day, with time and one-half for overtime [R. pp. 14, 54], and the *extension of said Exhibits "B-1" to "B-7", inclusive, to October 13, 1946,* by said Exhibit "B-8." [R. pp. 14, 54.] Said Exhibit "A" jurisdictional agreement, in effect, part of the collectively bargained agreements between the defendant Motion Picture Companies and both the Brotherhood of Carpenters and the defendant IATSE. There was, therefore, no basis for the pretense of a jurisdictional dispute between any of the parties.

The Exhibit "B-9" "Interim" agreement of July 2, 1946, between plaintiffs' Local 946 and said employer defendants, including provisions for a *two year period, and pending the signing of formal contracts, that is, pending the negotiation of formal contracts,* and likewise containing provision for a six hour day. [R. pp. 14, 55-60.]

Plaintiffs, and their class, worked under said contracts [R. p. 15] until they were removed from their work tasks by the defendant employers, and replaced with the IATSE, in the mass lockout of September 23, 1946 [R. pp. 22-24.]

The violation of all of said collectively bargained contracts, by all defendants, in said mass lockout and replacement is alleged, as follows:

The Former Conspiracy:

In the conspiracy of April, 1945, to replace the carpenters with the IATSE, in violation of all of said collectively bargained contracts, between the Brotherhood of Carpenters and the IATSE [Exhibit "A"; R. p. 36], and between the employer defendants and both the Brotherhood of Carpenters and the IATSE [Exhibits "B-1" to "B-8", incl.; R. pp. 41-54], as alleged in paragraphs XIX-XXI [R. pp. 15-17].

The Exhibit "C-1" letter from defendant Walsh, as president of defendant IATSE, of April 14, 1945, addressed "To all former studio employees," proclaimed the agreement between the IATSE and defendant Producers

Association to replace all carpenter employees with the IATSE [Par. XX; R. pp. 16, 61], as follows:

> "First of all, I want you to know that the International Alliance has reached an agreement with the Producers Association by which the I.A.T.S.E. will supply all labor to the studios, * * *" [R. p. 61.]

And admitted, as alleged in paragraph XXI [R. p. 16], that the IATSE had organized its carpenters' union to place IATSE men in the work tasks belonging to plaintiffs, and their class, as members of Carpenters Local 946, under said contracts, as follows:

> "On Tuesday night of this week a Carpenter's Local was chartered and is now known as Local No. 787 of the I.A.T.S.E. * * * there will be a local charter for Machinists, and if necessary for other crafts. *We are proceeding in accordance with our agreement with the Producers to man the studios.*" [Italics ours; R. p. 63.]

The AFL thereafter declared said IATSE "Carpenters Local 787" illegal and caused the IATSE to withdraw its charter. [Par. XXI; R. pp. 16-17.]

The Conspiracy:

The conspiracy in August and September, 1946, is shown by the minutes of the Labor Committee of the employer defendants [Exhibits "D-1" to "D-9"; R. 81-102]. They show the threat of defendant IATSE President Walsh to "have all work stopped in the studios, exchanges and theatres", if the producers respected the AFL Exhibit "C-3" award [R. 73], as clarified by the AFL Executive Council Committee [Exhibit "C-4"; R. 78-99], in accordance said collective contracts [R. 20],

and the conspiracy between the employer defendants and defendant IATSE resulting from said threat.

The conspiracy of the employer defendants is shown by the Exhibit "D-1" to "D-9", inclusive, minutes of their labor committee, thereof, quoted in part as follows:

(a) "It was agreed each Studio would assign work to Carpenters by Monday to create an incident." [R. 89.]

(b) "Brewer said to put I. A. men on sets so Carpenters * * * will quit, * * *." [R. 93.]

(c) "Discussed the proper method of procedure—how and when to get Carpenters * * * to refuse to work —when to replace with I. A. etc." [R. 93.]

(d) Agreed "that Studios would begin on the 1st shift Thursday to ask Carpenters * * * to perform the work on sets they had considered 'hot' and if and when they refuse to then ask the I.A. to do the work after arranging with Brewer." [R. 94.]

(e) Agreed that "There is to be no hurry to clean out all Carpenters * * * running into Friday or even Saturday if necessary." [R. 94.]

(f) Agreed that "one person in each Studio is to be designated as the man for Silberberg's office to contact." [R. 95.]

(g) Agreed that "caution must be used to see that the Thursday program is not made known outside a very few of your personnel." [R. 95.]

(h) Agreed that "Deadline—By 9 A. M. Monday (September 23) clear out all Carpenters * * * following which proceed to put on I. A. men to do the work." [R. 97.]

(i) Agreed that "In the event that such employee asks whether he is being discharged, he should be told 'no.'" [R. 88.]

(j) Agreed that "If any employee asks to return to his former job he is to be welcomed back." [R. 89.]

(k) Agreed that "Overtime and 6 or 8 hour day—No decisions reach (on September 17) let conditions dictate." [R. 95.]

(l) Declared as their purpose that "Producers want an eight-hour day," on September 24." [R. 102.]

(m) Were advised "Lawyers said we can't refuse to bargain and told of consequences. Carpenters situation may or may not have been an unfair labor practice * * *" [R. 98].

(n) Were further advised "Maintenance Men—Metro and some other studios have requested maintenance men to work on sets, and upon refusal have dismissed them. Alfred Wright (Attorney) stated the studios cannot morally or legally assign maintenance men who never have worked as journeymen on sets to set work" [R. 99].

(o) But were also advised "Benjamin (attorney) expressed belief that even though N. L. R. B. might decide Producers had engaged in unfair labor practice there was a good chance the Board might not assess any back pay" [R. 99].

(p) Agreed upon "Unemployment Compensation—Cragin of the Loeb office wanted instructions for the Comptrollers as to what position the Producers wanted to take on statement to be made to the State Unemployment Fund. It was agreed to say 'the employee left

his work on account of a trade dispute' and to ask the Department to disqualify him for unemployment compensation." [R. 90.]

Layoff Replacement and Lockout:

In pursuance of said conspiracy, defendants on September 23, 1946, ordered plaintiffs and their class from their work tasks and from the studios, in a mass lockout [R. 22-23], and replaced them with the IATSE [R. 24], and made the representations agreed upon to the California State Unemployment Insurance Commission [R. 24], and have deprived them of their lawful work tasks, and eligibility for work tasks, under said contracts, from said day to the present time [R. 24-25].

That on or about July 3, 1947, and while the above mentioned Labor-Management Relations Act of 1947 was in full force and effect, and binding upon the parties to this action, the plaintiffs, and said class of persons, offered and sought to negotiate and bargain with said employer defendants for the purpose of ending said lockout, and said boycott, to the end that they might resume their work tasks pursuant to the aforesaid agreements then in force, or as they might be extended and modified by negotiations.

That members of plaintiffs' class filed charges before the Labor Board [R. 27], which were referred to a field examiner who was a long-standing member of the defendant IATSE [R. 28]. That in spite of the protest by members of plaintiffs' class, they were deprived of hearings or of a remedy before the Labor Board [R. 29, 31].

AUG 23 1950
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

October Term, 1950.
No. 222

OSCAR SCHATTE, *et al.*,

Petitioners,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; RICHARD F. WALSH; ROY M. BREWER; LOEW'S, INCORPORATED, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Respondents Association of Motion Picture Producers, Inc., Loew's, Incorporated, Paramount Pictures, Inc., Warner Bros. Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Twentieth Century-Fox Film Corporation, R. K. O. Radio Pictures, Inc., and Universal Pictures Company, Inc.

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Additional Statement of Facts.

This action was filed by a number of individuals purportedly as "members of a class of persons aggregating approximately 2,000 in number," viz., the members of Local 946 of the United Brotherhood of Carpenters and

Joiners of America, an A. F. of L. Union [R. p. 11], against the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, which is another A. F. of L. Union, and a group of motion picture producers and their trade association. Hereinafter, Local 946 will be so designated; The United Brotherhood of Carpenters and Joiners of America will be referred to as the Carpenters' Union; the International Alliance as the IATSE, and the producers as the Employer Defendants. The complaint was finally dismissed by the District Court after two previous attempts to amend to state a claim within the Court's jurisdiction had proved unsuccessful (84 Fed. Supp. 669). On appeal, the United States Court of Appeals for the Ninth Circuit affirmed (182 F. 2d 158).

Contemporaneously with the decision by the Court of Appeals in this case, that court handed down opinions dismissing complaints in two companion cases: *Studio Carpenters' Local Union 946 v. Loew's, Inc., et al.* (182 F. 2d 168), and *Andrew Mackay v. Loew's, Inc.** (182 F. 2d 170). Petitions for certiorari have been filed in these two cases and these respondents are contemporaneously herewith filing briefs in opposition thereto.

All three cases arise out of the same basic set of facts involving a jurisdictional dispute between Local 946 and the Carpenters' Union on the one hand, and the IATSE on the other, over the division of work in the motion picture studios of the Employer Defendants. Furthermore, these three cases were preceded by another case involving

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*This case was consolidated with seven other suits brought by different individuals against different producers, but all identical as to allegations here pertinent.

the same jurisdictional dispute, brought by individuals many of whom are plaintiffs here, and against the same defendants, such case being also entitled *Oscar Schatte v. The International Alliance of Theatrical Stage Employees, et al.* (hereinafter called the First *Schatte* case). The First *Schatte* case was an action for declaratory relief containing most of the allegations of the complaint in this case. It was dismissed by the District Court for lack of jurisdiction (70 Fed. Supp. 1008), which decision was affirmed by the Court of Appeals for the Ninth Circuit (165 F. 2d 216) and certiorari was denied by this Court (334 U. S. 812).

The complaint in this case covers some 94 pages of the printed record [R. pp. 8-102]. It is replete with charges of conspiracy, fraud, bad faith and illegality, with conclusions and arguments of the pleader, and with solely evidentiary matter. If, however, we eliminate all the characterizations and adjectives and confine ourselves simply to what is alleged to actually have been done, we believe the following to be a fair statement of the occurrences alleged.

The IATSE and the Carpenters' Union, of which Local 946 is a unit, are both affiliated with the A. F. of L. For a number of years, prior to September, 1946, they each furnished employees to the Employer Defendants for studio work under loose written agreements on a closed-shop basis [R. pp. 12-14; 41-54]. During the year 1945, jurisdictional disputes involving a number of unions, including the IATSE and the Carpenters', resulted in a strike by certain unions in which strike the Carpenters' Union and Local 946 took part [R. pp. 15-17; 61-64]. As a part of the strike's settlement, the A. F. of L. appointed a committee with plenary power to settle jurisdictional dis-

putes and the committee rendered a decision in December, 1945, purporting to determine, among other disputes, those between the Carpenters' Union and the IATSE [R. pp. 18-20; 73-78]. Thereafter, and in late August, 1946, a dispute arose between the Carpenters' Union and the IATSE as to the effect and validity of such decision and of a "clarification" thereof, especially as regards jurisdiction over the erection of sets on stages. Both unions claimed the right to do this work. The IATSE threatened the Employer Defendants that if this work was taken from them, they would stop all work in studios, exchanges and theatres [R. p. 81]. The Carpenters' Union told the Employer Defendants that if the IATSE continued to do the set erection, the sets would be declared "hot" and the members of the Carpenters' Unions and of Local 946 would do none of the further necessary work on such sets which had to be done by such employees if the sets were to be of any value [R. p. 84]. Caught between these two ultimatums and faced with the alternatives of either closing their studios or standing a strike by one or the other of these Unions, the Employer Defendants determined to continue to use IATSE members for set erection [R. p. 83 *et seq.*]. When they assigned members of Local 946 to work on such sets, such members refused to perform any work [R. p. 22]; whereupon (as it is alleged), the Employer Defendants discharged them from their work tasks, ordered them from the studio premises and replaced them with IATSE members who would do the work [R. pp. 23-24]. Thus, the studios were kept open. This refusal of the Carpenters to do the work assigned to

them and the consequent discharge took place "on or about September 23, 1946" [R. p. 22], and it is alleged that ever since such time, IATSE members and permittees have done the work.

Thereafter, certain members of Local 946 filed unfair labor practice charges with the National Labor Relations Board. These were investigated and ultimately dismissed by officials of the Board [R. pp. 27-29]. Also, certain members of Local 946 filed claims for unemployment compensation with the California State Employment Commission. That Commission heard the claims and denied such compensation on the grounds that the applicants had left their employment because of a trade dispute [R. pp. 24; 32]. Plaintiffs then commenced this action.

The action is one for damages. No diversity of jurisdiction is alleged, but jurisdiction is attempted to be supported by reference to a number of Federal statutes, primarily the Labor Management Relations Act (LMRA); its predecessor, the National Labor Relations Act (NLRA); the Social Security Act; the Civil Rights statutes and the Sherman and Clayton Acts.

We think the statement of the basic facts in the complaint clearly shows that this case presents nothing more than an attempt by one union, defeated in a jurisdictional struggle with another, to utilize the Federal courts to avenge itself not only upon its victorious rival, but upon the employers who were caught in the middle. In spite of the rather pretentious expression by petitioners of the "reasons for granting the writ" (Ptn. p. 9), we submit that there is nothing in this litigation calling for a discretionary review by this Court under the principles laid down in Supreme Court Rule 38.

ARGUMENT.

I.

Outline of Issues.

The complaint purports to set up four separate "causes of action." However, as a cursory reading will show, there is no logical segregation of many of the allegations between the separate "causes of action," and since each adopts all of the allegations of one or more of the others, it is impossible to treat such "causes of action" entirely separately. The same lack of logical continuity or development exists with respect to the thirteen "Specifications of Error" and the eleven "Reasons" given in the Petition for Certiorari. We can only, therefore, do as the Court of Appeals did and try to divide petitioners' contentions into some limited number of logically associated claims. That court found five such claims, viz.:

1. A claim under Section 301 of the LMRA.
2. A claim under Section 303 of the LMRA.
3. A claim for violation of rights created by Section 7 of the NLRA Acts, specifically a refusal to bargain with Local 946.
4. Claims under the Civil Rights statutes.
5. A claim under the Sherman and Clayton Acts.

The petition is based generally on alleged conflict between the decision of the Court of Appeals and decisions of this Court and of other Courts of Appeal (Ptn. p. 9). No such conflict exists. The opinion of the Court of Appeals is so clear and convincing that we believe we can demonstrate the lack of any substance or merit in the petition in reasonably short order.

II.

The Complaint Does Not State a Claim Under Section 301 of the Labor Management Relations Act.

Petitioners contend that they have alleged a cause of action for breach of contract under Section 301* of the LMRA (29 USCA, Sec. 185). The Court of Appeals has answered the contention completely and conclusively. The Act was not passed until June 23, 1947. The complaint alleges that the discharge of petitioners and their replacement occurred on or about September 23, 1946, or nine months before the Act was passed [R. p. 23]. The Act creates substantive Federal rights in the protection of labor contracts and not merely procedural remedies. (*Wilson & Co. v. United Packinghouse Workers* (D. C. S. D. N. Y., 1949), 83 Fed. Supp. 162; *Colonial Hardware Flooring Company v. International Union* (D. C. Md., 1948), 76 Fed. Supp. 493.) If it were limited to procedural remedies, it would probably be unconstitutional if applied in the absence of diversity. (*Gully v. First National Bank* (1936), 299 U. S. 109; "Jurisdiction of Federal Courts in Labor Disputes," by Ray Forester, 13 Law and Contemporary Problems 114.) Statutes which create substantive rights are not given retroactive application. (*Winfree v. Northern Pacific Railroad* (1923), 227 U. S. 296.) When this alleged breach occurred in September, 1946, there was no right to an action for it in the Federal courts' absent diversity (First *Schatte* case, 70 Fed. Supp. 1011, affd. 165 F. 2d 216, cert. den. 334 U. S. 812) and such right could not be created retroactively by the passage of the LMRA nine months later.

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*Section 301 is set out in full in Appendix A.

Petitioners contend that there was some sort of a "continuing breach of contract." This contention presents no important question of law requiring decision by this Court. Nevertheless, the contention is clearly erroneous. The allegations are, that not only were the petitioners discharged and ordered off the premises, but were thereupon replaced by others who still hold the jobs [R. pp. 23-24]. The Court of Appeals held that this alleged an immediate and total breach with but one cause of action therefor. The cases cited by that court indisputably so declare. For example, in *Baron v. Kurn* (Mo., 1942), 164 S. W. 2d 310, where plaintiff was laid off and others hired to replace him, the court said:

> "Ultimate performance of the railway's obligation charged to have been breached was due when plaintiff was entitled to return to service . . . and the breach, if any, occurred when it then failed to perform."

In the case of *Howard v. Chicago Railway Co.* (8th Cir. 1945), 146 F. 2d 316, the court said:

> "Whatever cause of action plaintiff here had accrued when he was discharged."

To the California case of *Seymour v. Oelrichs* (1909), 156 Cal. 782, holding to the same effect, may be added the case of *Wood v. Girot* (1929), 102 Cal. App. 160.

Petitioners maintain that the cases of *United States v. Trans-Missouri Freight Association* (1896), 166 U. S. 290, *NLRB v. Local 74* (6th Cir. 1950), 181 F. 2d 126, and *A. F. of L. v. Western Union Telegraph Co.* (6th Cir. 1950), 179 F. 2d 535, hold to the contrary. In this contention the petitioners are clearly in error. Neither of the first two cases had anything to do with contract

violations. All that they held was that a series of continuing acts, legal when commenced, might become illegal if continued after the passage of prohibitory legislation. The decisions are, of course, correct; otherwise, many anti-social situations could never have been remedied. Here, however, the only thing that continued was the *status quo* created by a completed breach, and the LMRA neither purported to nor could go back in time to create a cause of action for such breach. The Court of Appeals has correctly disposed of the *Western Union* case.

There are no adequate grounds for granting the writ of certiorari on this issue, and the decision of the Court of Appeals is obviously correct. In addition, however, there is another cogent reason equally destructive of petitioner's claim under Section 301, which was passed over in the opinion below since the Court considered the above ground sufficient, as, of course, it is. That section refers to "suits for violations of contracts between an employer and a labor organization." The debates in Congress and reports of committees indicate clearly that the only parties to be permitted to litigate over labor contracts in the Federal Court were employers and labor unions and not individual union members as is the case here. Excerpts from such Congressional material are contained in Appendix B attached. This is the interpretation given by lower Federal Courts in two recent cases. In *Electrical Workers v. Fawick Airflex Co.* (D. C. N. D. Ohio 1950), 25 LRRM 2396, the court ordered the names of two individual members stricken from a complaint under Section 301

on the grounds that the section "gave the Union the sole right to maintain this action." In *Zaleski v. U. E. W.* (D. C. N. J., May 18, 1950), 26 LRRM 2262, the court stated that Section 301 had no application to a suit by an individual since the section "restricts actions to suits between an employer and a labor organization." Consequently, both because the breach occurred prior to the passage of the statute giving any cause of action and because petitioners are not granted the right to sue, the complaint states no claim under Section 301.

III.

The Complaint Does Not State a Claim Under Section 303 of the Labor Management Relations Act.

Petitioners also contend that their complaint entitles them to damages against the Employer Defendants under Section 303* of the LMRA (29 USCA 187). That provision makes it unlawful for a "labor organization to engage in or to induce or encourage the employees of any employer to engage in strikes or work stoppages" with the object, among other things, of forcing the employer to make a choice in a jurisdictional dispute, and provides civil remedies to persons injured by violations. Again, the Court of Appeals gave a short and complete answer—the complaint contains no allegations bringing plaintiffs within the terms of this section.

The statute requires for a violation that the labor organization either call a strike or induce or encourage the

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*Section 303 is set out in full in Appendix A.

employees to strike. Of course, there is no allegation here that the IATSE struck. Quite to the contrary, its members continued to work [R. p. 24]. And the only "threats" alleged to have been made by the IATSE were to the *employers*—not to the *employees* [R. pp. 21-26; 80-81]. Therefore, as the Court of Appeals held, no violation of Section 303 is alleged. Its decision that threats to an employer are not actionable is not only clearly required by the language of the statute but has support in decisions to the same effect both by the NLRB and by other Federal Courts:

(*Humphrey v. Teamsters' Union D. C.* (D. C. N. Y., 1950), 25 LRRM 2318; *In re Electrical Workers,* 82 NLRB No. 132, 23 LRRM 1661; *In re Teamsters' Union,* 87 NLRB No. 130, 25 LRRM 1202; *In re Spokane Building and Trades Council,* 89 NLRB No. 141, 26 LRRM 173.)

Petitioners contend that the decision of the Court of Appeals denying any rights to them under Section 303 is contrary to the rulings of this Court in *Duplex Printing Company v. Deering* (1921), 254 U. S. 443 and *Allen Bradley Company v. Local Union No. 3* (1945), 325 U. S. 797. Neither case, of course, has anything whatever to do with the LMRA which was not even passed when these cases were decided. We have here a pure matter of statutory construction decided in accordance with the plain language of the statute and with no case, so far as we know, taking any contrary view.

Again, there were other adequate reasons not touched on by the Court of Appeals which would make Section 303

inapplicable in any event. In the first place, all of the acts or threats on which petitioners rely in the complaint took place at least nine months before that section was passed,* at a time when under the laws of most states, including California, acts of the type proscribed by Section 303 were legal (*Parkinson Co. v. Building Trades Council* (1908), 154 Cal. 581). In fact, at that time, this Court had declared a jurisdictional strike immune from Federal action under the then law (*U. S. v. Hutcheson* (1941), 312 U. S. 219). Damages for such acts could not be made retroactively recoverable (*Cf. Styles v. Local 74* (D. C. Tenn. 1947), 74 Fed. Supp. 499).

In the second place, as far as Employer Defendants are concerned, no right of action would exist against them under any circumstances because Section 303 applies only to acts committed by "labor organizations." Since an employer cannot be guilty of violating Section 303(a), it seems axiomatic that he cannot be liable for damages under Section 303(b). Insofar, therefore, as petitioners claims under Section 303 are concerned, not only does the petition show no ground for granting the writ under Rule 38, but it is clear that the decision of the Court of Appeals was the only decision which could have been reached.

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*The "threat" of the IATSE on which petitioners rely took place on August 22, 1946 [R. p. 81].

IV.

The Complaint Does Not State a Claim Within the Jurisdiction of This Court for Violation of Rights Arising Under Section 7 of the National Labor Relations Act.

Petitioners contend that it was error for the Court of Appeals to hold that: "Deprivation of the rights guaranteed by Section 7 of the Wagner Act would have been an unfair labor practice under Section 8(1) thereof, and that the exclusive remedy therefor was in proceedings before the Labor Board" and further to hold that: "Whatever privileges and immunities were created by the National Labor Relations Act were limited in scope to the remedies which were provided for enforcing those privileges and immunities." We should suppose that no principles of labor relations law are so well settled as those which petitioners here attack, and the fact that they do so attack them is, we submit, evidence of the entire petition's lack of merit. Both the original NLRA and its amended form in LMRA make violations of the rights granted by Section 7 unfair labor practices. (Section 8 (1).) The NLRA specifically provided that the National Labor Relations Board had exclusive jurisdiction over unfair labor practices (Section 10); the passage of the LMRA did not change this rule: (*Amazon Cotton Mill Co. v. Textile Workers' Union* (4th Cir. 1948), 167 F. 2d 183; *United Packing House Workers v. Wilson* (D. C. Ill. 1948), 80 Fed. Supp. 563; *I. L. U. v. Sunset Line & Line Co.* (N. D. Cal. 1948), 77 Fed. Supp. 119). An unbroken line of cases, including the decision of this Court in *Amalgamated Utility Workers v. Consolidated Edison Company* (1940), 309 U. S. 261 upholds the exclusive jurisdiction of the Board. These include cases both before and after the passage of the LMRA. Several are cited

in the Court of Appeals' decision; many more could be cited, with none to the contrary.

Petitioners assert the Court of Appeal's ruling is in conflict with the decisions of this Court in *A. F. of L. v. Watson* (1946), 327 U. S. 582 and *Moore v. Illinois Central Railroad Company* (1941), 312 U. S. 630. (Ptn. p. 10.) Again these cases have not the remotest bearing here. The former held that a Federal Court has jurisdiction to hear a claim that a state statute invaded the field occupied by the National Labor Relations Act. The latter—a diversity case—involved the Railway Labor Act and held that plaintiff was not required to present his claim before the Railway Adjustment Board before bringing suit, because there was nothing in that Act which expressly or impliedly made jurisdiction of that Board exclusive (But Cf. this Court's decision in *Slocum v. Delaware Railway Company* (1950), 70 S. C. Rep. Adv. Op. p. 577). Neither case involved unfair labor practices or any claim for damages for breach of asserted rights arising under the Labor Acts.

Petitioner also claims conflict with the decision of the 6th Circuit in *Gatliff Coal Co. v. Cox* (1945), 152 F. 2d 52. That was an action brought under the Fair Labor Standards Act for wages measured in amount by the terms set forth in a collective bargaining agreement. Jurisdiction was, of course, vested in the Federal Courts both because of the Act under which the case was brought and because of diversity, which there existed, and would have been equally so vested whether the collective bargaining agreement was in existence or not.

Petitioners' contention here is the same as that advanced by them under the same facts in the First *Schatte* case where both lower courts dismissed the complaint and this court denied certiorari. We submit that the same result should follow here.

V.

The Complaint Does Not State a Claim Under the Civil Rights Statutes.

In the First *Schatte* case, plaintiffs, who included many of the petitioners here, claimed that the complaint vested the Federal Court with jurisdiction under the Civil Rights statutes (8 USCA 43, 47(3)). That contention was there denied (70 Fed. Supp. 1008, 1010) and its denial affirmed on appeal (165 F. 2d 216; cert. den. 334 U. S. 812). Of course, the Court of Appeals was right in holding that case decisive of the same issues here. Petitioners' contention that the First *Schatte* case decided nothing because it held that no jurisdiction existed (Ptn. p. 19) is patently unsound, to put it mildly. If there was no jurisdiction in the Federal court under these statutes in the First *Schatte* case, there is no jurisdiction under the same allegations in this case.

However, petitioners have added certain allegations which they contend permit them to recover from the Employer Defendants under Sections 43 and 47(3). We refer to the allegations that the Field Examiner for the NLRB, who investigated the unfair labor practices filed by members of Local 946 against the Employer Defendants, was a member of the IATSE [R. p. 27-29] and the allegation that the Employer Defendants "induced" the California Employment Commission to deny a fair hearing on the claims for unemployment benefits filed by certain plaintiffs [R. p. 32]. Such "inducement" consisted merely in advising the Commission that the Carpenters had left their work because of a trade dispute [R. p. 24].

There are no allegations of conspiracy between the defendants and either of the administrative agencies referred to or any officer or representative thereof, no allega-

tions of fraud or corruption on the part of either agency or its officers, and no allegation that the Employer Defendants had anything to do with the acts of either agency other than the pure conclusion that "by the same means" the defendants induced the agencies to deny petitioners "their rights" [R. pp. 31, 32].

The decision of the Court of Appeals that these allegations do not vest the Federal courts with jurisdiction certainly does not present any novel point of law. Any other decision would simply mean that every litigant before the National Labor Relations Board or before a state court or administrative agency would have the right to try his case all over again in the Federal courts. Not only is the decision clearly correct, but it is supported by a host of cases including *Love v. Chandler* (8th Cir., 1942), 124 F. 2d 785; *Mitchell v. Greenough* (9th Cir., 1938), 100 F. 2d 184; *Bottone v. Lindsley* (10th Cir., 1948), 170 F. 2d 705; *Laughlin v. Rosenman* (Dist. of Col. C. A., 1947), 163 F. 2d 838; *Davidow v. Lachman Brothers* (9th Cir., 1935), 76 F. 2d 186; *Allen v. Corsano* (D. C. Del., 1944), 56 Fed. Supp. 169, and the very late case of *Campo v. Niemeyer* (7th Cir., 1950), 182 F. 2d 115.

Petitioners' so-called "directly conflicting" cases are again not at all in point. *NLRB v. Phelps* (5th Cir., 1943), 136 F. 2d 562; *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937), 301 U. S. 292, and *Morgan v. U. S.* (1938), 304 U. S. 1, each involved direct review of the actions of administrative agencies and officials under statutes providing therefor or in the course of ordinary appellate procedure. *Lincourt v. NLRB* (1st Cir., 1948), 170 F. 2d 306, holds, as petitioners contend (Ptn. p. 15) that under the Taft-Hartley Act, the General Counsel of the NLRB has final authority over the prosecution or dismissal of unfair labor practice charges,

but there is nothing in that holding which conflicts, in the slightest, with the opinion of the Court of Appeals here. In fact, the finality of administrative action in dismissing unfair labor practice charges existed under the Wagner Act (*Jacobsen v. NLRB* (3rd Cir., 1941), 120 F. 2d 96). This is, of course, in line with the reasoning of this Court in *Amalgamated Workers v. Edison Company* (1940), 309 U. S. 261.

We do not contend that if there were any fraud or corruption on the part of the administrative Board or officials (which has not been and could not fairly be alleged here), there would be no remedy therefor. As to the National Labor Relations Board, there would seem to be ample power to correct action so taken under the provisions of the Administrative Agency Act (U. S. C., Title 5, Sec. 1001, 1009). As to the action of the California Employment Commission, there was present a perfectly adequate and available procedure for review of its decisions, by a State court (*Bodinson Manufacturing Company v. California Employment Commission* (1941), 17 Cal. 2d 321). Petitioners' failure to invoke that remedy is an additional ground for denying any alleged "right" under the Civil Rights statutes (*Trudeau v. Barnes* (5th Cir., 1933), 65 F. 2d 563; *Allen v. Corsano* (D. C. Del., 1944), 56 Fed. Supp. 169).

But, certainly, whatever remedies petitioners might have in a proper case to correct wrongful acts by the agencies, they do not extend to a suit for damages against these Employer Defendants. Petitioners have not alleged any deprivation by these defendants of any "Civil Rights" as defined by 8 U. S. C. A., Sections 43 and 47(3).

Petitioners refer to the recent decision of the 9th Circuit Court of Appeals in *Hardyman v. Collins*, ... F. 2d ..... (May 29, 1950). Petitioners can receive no

comfort from this decision, for aside from the fact that in the instant case there are no allegations whatever of interference by defendants with any civil rights of petitioners, the *Hardyman* case holds that the only rights protected by Section 47(3) from individual invasion are rights of *citizens of the United States* as such, which are narrowly limited to those directly involving a necessity for protection by the National Government. The examples given by the Court make it clear that the "rights" claimed by petitioners here are not so covered (*cf. Slaughterhouse* Cases (1877), 83 U. S. 36, 76). They are "rights" of citizens of the several states and as such not within the purview of Section 47(3).

The petition apparently makes some claim that jurisdiction to award damages may be grounded on the Federal Social Security Act (Ptn. pp. 8, 16). Aside from the matters already pointed out, it is completely clear that the Social Security Act gives no rights whatever to petitioners. It is simply an appropriations act, giving Federal aid to those states which have acceptable unemployment statutes and providing that if the states do not comply with certain requirements, such aid will be withdrawn (*cf.* Ptn. App. A., pp. 4-6). The sole right to unemployment benefits arises under California law. The deprivation of rights arising under state laws gives rise to no cause of action under the Civil Rights statutes (*Hardyman v. Collins, supra; U. S. v. Harris* (1882), 106 U. S. 629; *Baldwin v. Franks* (1887), 120 U. S. 678).

The Court of Appeals' decision is not one of any novel question; rather it is one supported by a wealth of unanimous authority. A contrary decision would have meant, as that Court and other Courts have universally recognized, the extension of Federal jurisdiction to the review

of every state court or board decision and the overthrow of the established principle of exclusive jurisdiction over unfair labor practices in the Labor Board. Certainly, no grounds for the exercise of this Court's discretionary power of review exists as to this phase of the case.

VI.

The Complaint Does Not State a Claim Under the Sherman or Clayton Acts.

Finally, petitioners contend that their complaint states some sort of grounds for recovery under the anti-trust laws. The Court of Appeals correctly disposed of the contention and petitioners' somewhat summary treatment of it in the petition (Ptn. p. 18) would indicate to us that they do not press it seriously.

The allegations on which the petitioners rely are that the defendants entered into a two-headed conspiracy (1) to discharge all members of the Carpenters' Union and replace them with members of the IATSE and (2) to destroy the independent producers. With respect to the phase of the conspiracy, the petitioners adopt all of the allegations in their "first cause of action" and alleged generally in the language of the statute that petitioners have "been injured in their business or property" by the conspiracy [R. p. 134]. With respect to the second phase of the conspiracy, it is alleged that the defendants "caused" independent producers likewise to employ members of the IATSE, rather than of the Carpenters' Union; that the former were less efficient than the latter; that, consequently, the costs of production would be increased; that as

a result, some independents might not be able to bear such increases in costs and be forced out of business, in which case the Employer Defendants would pass on their own increased costs to the theatre exhibitors so that the public, including the plaintiffs, would have to pay more money to see a motion picture [R. pp. 33-34].

Petitioners are here suing for damages because when they refused to perform the work assigned to them by their employers, they were discharged and replaced by members of a rival Union [R. pp. 22-24]. Setting aside any question as to whether such action by Employer Defendants was legally justified or not, the fact remains that if any injury was suffered by petitioners, it was one suffered in the ordinary course of a labor dispute which is immune as such from the proscription of the anti-trust laws. (*Apex Hosiery Company v. Leader* (1940), 310 U. S. 469); (*U. S. v. Hutcheson* (1941), 312 U. S. 219; *U. S. v. A. F. of Musicians* (D.C. Ill. 1942), 47 Fed. Supp. 304, affd. (1943), 318 U.S. 741; *United Brick, etc. Workers v. v. Junction City Clay Company* (6th Cir., 1946), 158 F. 2d 552.)

This case bears no resemblance whatever to *Allen Bradley v. Local Union No. 3* (1945), 325 U. S. 797, cited by petitioners. There, the Court found an "unholy alliance" between a group of employers and a group of unions for the purpose and with the effect of controlling markets and prices. It held that an independent manufacturer, shut out from the market by such a combination, could have redress by injunction against such unlawful control of markets

and prices. But this Court made it clear in that decision that the plaintiff could not have an injunction against acts done in the course of a labor dispute or against ordinary incidents of labor relations, such as agreements (including closed-shop agreements) between employers and unions. The acts and contracts of the union were enjoinable only to the extent that they control or attempt to control markets and prices to the injury of the plaintiff by reason of such control.

Even if we should here assume that the complaint states the elements of a conspiracy against the independent producers under the anti-trust acts, which we vigorously deny, that conspiracy had nothing to do with these petitioners. They lost their jobs in the course of an ordinary every-day labor dispute—a refusal, for reasons apparently satisfactory to them, to work on sets they had declared to be "hot" because of an inter-union jurisdictional wrangle. Such loss involved no question of control of markets or prices. As the Court of Appeals aptly put it: "the loss of their rights of employment is not a result of any lessening of commercial competition among the studios."

The treble-damage remedy provided by the anti-trust laws is admittedly a drastic one. For that reason, the scope of those laws must be limited to injuries received as a direct consequence of combinations to restrain free competition and to control markets and prices (*Apex Hosiery Co. v. Leader, supra*). Injuries received by reason of agreements between labor organization and employers such as closed-shop contracts or other restrictive

arrangements are not actionable under the Sherman Act, no matter why they were made (*Hunt v. Cromboch* (1945), 325 U. S. 821), unless they are simply designed to and do injure the plaintiff by reason of price and market control (*Allen Bradley Co. v. Local Union No. 3, supra*). The discharge of these petitioners had nothing whatever to do with either of those elements, and the Court of Appeals correctly so held. A contrary holding would not only fly in the face of the decisions of this Court referred to, but would extend the anti-trust acts to cover almost the entire field of labor disputes, and prevent any employer from trying to keep his establishment open in the face of jurisdictional strikes.

VII.

Conclusion.

As both the District Court and Court of Appeals held, this case has no standing in the Federal Courts. The state courts presented an available and proper forum for the determination of any controversy between the parties. For some reason, however, the petitioners did not choose that forum but resorted to the Federal Court. There being no diversity of citizenship and the jurisdiction of Federal courts being limited, they have seized upon every conceivable statute that a fertile imagination could connect in any way with their claims in order to form a basis for staying in court.* Unfortunately for petitioners, this is simply not the kind of an action which belongs in the Federal Courts, and the statutes are simply not applicable as the lower courts properly held.

"Ham: Upon what ground?
1st GD: Why, here in Denmark."
(Hamlet, Act V, Scene 1.)

Above all, this is not the kind of an action which should occupy the time of the Supreme Court of the United States. Petitioners were employed to perform services for the producers. They were assigned work to do and refused to do it because they claimed their jurisdiction had been invaded by another union. When they refused to work, they were replaced by others who would work. Except for the fact that there are a sizeable number of men involved, the case is no different than other inter-union squabbles which come up every day. It presents no novel questions of legality, and such matters as it does present have been decided correctly at all events. We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

(1) *Section 301, Labor Management Relations Act, 1947, Title 29, U. S. C., §185.*

"TITLE III—SUITS BY AND AGAINST LABOR ORGANIZATIONS.

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in

the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

(2) *Section 303, Labor Management Relations Act, 1947, Title 29, U. S. C., §187:*

"BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS.

"SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer),

if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

APPENDIX B.

Excerpts From Congressional History of Section 301, Labor Management Relations Act, 1947, Title 29 U. S. C. Sec. 185.

Senate Committee on Labor and Public Welfare, Report No. 105 of S. 1126, April 17, 1947:

"* * * Title II gives labor unions the right to sue and be sued as legal entities for breach of contract in the Federal courts. * * * (p. 3.)

* * * * * * * * *

"ENFORCEMENT OF CONTRACT RESPONSIBILITIES.

"The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal Courts.

Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made' (*H. J. Heinz & Co.*, 311 U. S. 514.)

"The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the mem-

bers before an action can be maintained against the union. This is an almost impossible process. Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

"President Truman, in opening the management-labor conference in November, 1945, took cognizance of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract.

" 'We shall have to find methods not only of peaceful negotiations of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.'

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

"Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

"The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment. Thus the members of the union would secure all the advantages of limited liability without incorporation of the union. (pp. 15-16.)

* * * * * * * * *

"TITLE III.

"SUITS BY AND AGAINST LABOR ORGANIZATIONS.

"Section 301 is the only section contained in this title. It relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of Section 8 of Title I also dealing with breach of contracts. The legal effect of this section has been described at some length in the main body of the report, *supra*." (p. 30.)

Minority Report by Senators Thomas, Murray, and Pepper (p. 13):

"Section 301 of Title II of the bill gives the Federal District Courts broad jurisdiction to entertain

suits for breach of collective-bargaining contracts in industries affecting interstate commerce regardless of the amount in controversy and of the citizenship of the parties. This section permits suits by and against a labor organization representing employees in such industries, in its common name with money judgments enforceable only against the organization and its assets.

"(1)*Suits for violation of collective-bargaining agreements.*

"The Federal Courts have always had jurisdiction to entertain suits for breach of collective-bargaining contracts and have awarded money damages where the amount in controversy fulfills the present $3,000 requirement and diversity of citizenship exists. *Nederlandsche Amerikaanische Stoomvart Maatschappij v. Stevedores and Longshoremen's Benevolent Society* ((1920), 265 Fed. 397). It is apparent from the language of Section 301 that no change is made in the application of State law for this purpose. The section states that—

> " 'Suits for violation of contracts concluded * * * in an industry affecting commerce * * * may be brought in any district court of the United States * * *.'

"Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected.

"The abandonment of the present amount in controversy and diversity of citizenship requirements is an unwise departure from existing law, which would impose a needlessly increased burden upon the Federal Courts, already weighted down with litigation. * * *"

In presenting the proposed bill to the Senate, Senator Taft stated (Cong. Rec., 80th Cong., 1st Sess., p. 3955):

"Mr. President, Title III of the bill, on page 53, makes unions suable in the Federal Courts for violation of contract. As a matter of law, unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions."

In order to iron out differences between the two legislative branches, the bills were sent to a Conference Committee. Its report read in part as follows (H. R. Conf. Rep. 510, 80th Cong., 1st Sess., p. 65):

"Section 302 of the House bill and Section 301 of the Senate amendment contained provisions relating to suits by and against labor organizations in the courts of the United States. The conference agree-

ment follows in general the provisions of the House bill with changes therein hereafter noted.

"Section 302(a) of the House bill provided that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction. Under the Senate amendment the jurisdictional test was whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. This test contained in the Senate amendment is also contained in the conference agreement, rather than the test in the House bill which required that the 'contract affect commerce.'

"Section 302(b) of the House bill provided that any labor organization whose activities affected commerce should be bound by the acts of its agents and might sue or be sued as an entity in the courts of the United States. Any money judgment in such a suit was to be enforceable only against the organization as an entity and against its assets and not against any individual member or his assets. The conference agreement follows these provisions of the House bill except that this subsection is made applicable to labor organizations which represent employees in an industry affecting commerce and to employers whose

activities affect commerce, as later defined. It is further provided that both the employer and the labor organization are to be bound by the acts of their agents. This subsection and the succeeding subsections of Section 301 of the conference agreement (as was the case in the House bill and also in the Senate amendment) are general in their application, as distinguished from subsection (a).

"Section 302(c) of the House bill contained provisions describing the venue of suits to which labor organizations were parties and Section 302(d) provided for the manner of service of process upon labor organizations. These provisions of the House bill appear unchanged as Section 301(c) and (d) of the conference agreement.

"Section 302(e) of the House bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House bill. Section 301(e) of the conference agreement provides that for the purposes of Section 301 in determining

whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." (pp. 65-66.)

In summarizing the final bill for the Senate, Senator Taft said in part (Cong. Rec., 80th Cong., 1st Sess., p. 6600):

"* * * The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (Section 301). * * *"

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IN THE

Supreme Court of the United States

October Term, 1950

No. 222

OSCAR SCHATTE, *et al.*,

Petitioners,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Respondents.

Brief of Respondents The International Alliance, Etc., and Roy M. Brewer in Opposition to Petition for a Writ of Certiorari.

Additional Statement of the Case.

The International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, an international labor union, and Roy M. Brewer, its International Representative, Appellees below, on whose behalf this brief is filed, will be referred to as Labor Respondents; Loew's, Incorporated, Paramount Pictures, Inc., Warner Brothers Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Produc-

tions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Twentieth Century-Fox Film Corporation, R.K.O. Radio Pictures, Inc., Universal Pictures Company, Inc., and Association of Motion Picture Producers, Inc., will be referred to as Employer Respondents; the second amended and supplemental complaint will be referred to as The Complaint.

Some of the Petitioners herein were plaintiffs in *Schatte, et al. v. International Alliance, etc., et al.*, 70 Fed. Supp. 1008; affd. 165 F. 2d 216 (certiorari denied, 68 S. Ct. 1018, 92 L. Ed. 1742, 334 U. S. 812), in which the same conspiracy, in the main, and the same agreements relied upon in the instant action were asserted; that decision will be referred to as the *First Schatte Case.* All of the Petitioners herein and "the class of persons aggregating approximately 2,000 in number," whom they purport to represent, are members of Studio Carpenters Local Union No. 946, a chartered local of the United Brotherhood of Carpenters and Joiners of America. Said Local 946 was the plaintiff in the District Court action reported in 84 Fed. Supp. 675 and appellant in the same action when it reached the United States Court of Appeals for the Ninth Circuit (182 F. 2d (Adv.) 186). Said action will be referred to as *Studio Carpenters Case.* Concurrently with the filing of a petition for a writ of certiorari in the instant action, a like petition was filed in the *Studio Carpenters Case.*

Summary of Argument of Labor Respondents.

It is the position of Labor Respondents, to be developed hereinafter, that the petition for writ of certiorari herein should be denied for the following reasons. (a) Since Petitioners are neither a "Labor Organization" nor an "Employer," this action is not within the purview of Section 301(a), LMRA, 1947; (b) the asserted cause of action against Labor Respondents sounds in tort, not contract; hence District Court, in the absence of diversity of citizenship, lacked jurisdiction; (c) since Section 301, LMRA, 1947, is prospective and not retrospective in character and since contractual violations asserted by Petitioners occurred prior to enactment of LMRA, 1947, District Court lacked jurisdiction and no claim was stated under said Section 301 upon which relief could be granted; (d) threats of economic reprisals alleged to have been made by Labor Respondents to Employer Respondents do not constitute a violation of Section 303, LMRA, and since acts alleged to constitute a violation of said section occurred long prior to its enactment, no claim under said section upon which relief could be granted is pleaded; and (e) no conspiracy or effectuating acts in violation of the antitrust laws are alleged.

ARGUMENT.

I.

Diversity of Citizenship Not Existing, and Petitioners Not Being a "Labor Organization" or an "Employer," as Required by Section 301(a), LMRA, 1947, and the Claim Alleged in the First Cause of Action Against Labor Respondents Sounding in Tort and Not Contract, District Court Did Not Have Jurisdiction. Said Section 301(a) Is Prospective and Not Retrospective in Character; First Cause of Action Does Not Set Forth a Claim Against Labor Respondents Upon Which Relief Can Be Granted in Favor of Petitioners.

The First Cause of Action of The Complaint recites the contention of Petitioners (a) that Petitioners, as members of Carpenters Local 946, and all other members thereof similarly situated, on behalf of whom they sue, were, by reason of the existence of the alleged collective bargaining agreements, attached to The Complaint as exhibits, entitled to do carpenter work for the Employer Respondents; (b) that as a result of a conspiracy between Labor Respondents and Employer Respondents, Petitioners have been deprived of the rights legally bestowed by such alleged collective bargaining agreements; (c) that the conspiracy began in 1945, its purpose being to take all carpenter work tasks in the respective studios operated by the Employer Respondents "from the plaintiffs * * * and transfer and give the same to members or permittees" of Labor Respondent International Alliance, etc.; (d) that on or about September 23, 1946, said "plan" (conspiracy) was put into effect, whereupon the Employer Respondents unlawfully discharged the Petitioners from all their "work tasks," and that, as a part of the conspiracy, false repre-

sentations were made to the California State Employment Insurance Commission, resulting in Petitioners being denied unemployment benefits; (e) that a three-man Board of Arbitrators, appointed to resolve certain jurisdictional disputes in the studios, whose decision was to be final and binding on all parties, was imposed upon, and, as a result of a "secret" *ex parte* hearing at which they heard Richard F. Walsh, International President of Labor Respondent International Alliance, etc., "without right of cross-examination" by the Carpenters Union representative, such Board ordered a certain "non-existent agreement" between the Carpenters and Labor Respondent International Alliance, etc., to be immediately put into full force and effect. *Diversity of citizenship is not alleged; its absence affirmatively appears.*

Petitioners' contention that the District Court had jurisdiction under Sections 1331, 1337, and 1343, Title 28, U. S. C. A., or Amendments V and XIV of the Constitution of the United States, or the laws of the United States regulating commerce, particularly the National Labor Relations Act, as amended, or the Civil Rights Act, is determined adversely to them by the *First Schatte Case.*

The Court of Appeals below, after quoting Section 301(a), LMRA, 1947, 29 U. S. C. A., Section 185, which provides that "suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States without regard to the amount in controversy or without regard to the citizenship of the parties," stated: "We find it unnecessary to determine whether or not the complaint states a cause of action under §301 for the reason that said sec-

tion was enacted subsequent to the alleged breach of contract in the instant case and the section is therefore inapplicable." [R. 210.] Petitioners do not claim that they are either a labor organization or an employer, as those terms are defined in Section 2(2) and Section 2(5), LMRA, 1947.

It is our contention that Congress, in enacting Section 301, LMRA, 1947, and in permitting certain suits to be brought in District Courts of the United States without respect to the amount in controversy or without regard to the citizenship of the parties, intended that such permitted actions should be limited to those brought by employers against labor organizations or *vice versa*, or by labor organizations against labor organizations, and never intended that individuals, whether asserted third-party beneficiaries to collective bargaining agreements or other contracts to which employers and labor organizations are the actual parties, be allowed to institute actions in the District Courts of the United States without respect to the amount involved and without regard to the citizenship of the parties. We think it is clear that Congress intended that the word "between" should refer to the word "suits," and that such interpretation is clearly evidenced by the Congressional debates on this section of the Taft-Hartley Act. Said Section 301 has been so interpreted in *Electrical Workers v. Faudick Airflex Co.* (D. C. N. D. Ohio), 25 LRRM 2396, and *Zaleski v. U. E. W.* (D. C. N. J.), 26 LRRM 2262.

The charge against Labor Respondents is that they induced Employer Respondents, by threats of economic reprisals, to breach a collective bargaining agreement alleged to exist between such Employer Respondents and Car-

penters Union, and that, as a result thereof, work tasks provided for in such collective bargaining agreement were taken away from members of the Carpenters Union and given to members or permittees of Labor Respondent International Alliance, etc. These alleged wrongful acts charged against Labor Respondents, being a tort, are not within the jurisdiction of the District Court, in the absence of diversity of citizenship. Section 301(a), LMRA, is restricted to actions for breach of contracts.

The last act of the alleged contractual violation occurred on September 23, 1946, which was exactly *nine months prior to Section 301, LMRA, 1947, being enacted.* Section 301 permits labor organizations or employers to sue or be sued in District Courts of the United States "for violation of contracts." We submit that under all principles of law, both constitutional and otherwise, suits permitted under said section could only be for violations occurring *after* the Act was enacted—in other words, that Section 301 is prospective and not retrospective in character. (*Colonial Hardwood Floor Co. v. International Union,* 76 Fed. Supp. 493 at 496; *Wilson & Co. v. United Packing House Workers,* 83 Fed. Supp. 163.)

Accordingly, the Labor-Management Relations Act of 1947, and particularly Section 301 thereof, could not vest jurisdiction in the District Court unless it were given a retroactive effect. It is settled, however, that unless a statute is by its terms specifically given retroactive effect, its effect will be prospective only. (*Shwab v. Doyle,* 66 L. Ed. 747, 258 U. S. 529, 42 S. Ct. 391; *Neild v. District of Columbia,* 110 F. 2d 246, 254.)

II.

Threats to Engage in a Strike or Work Stoppage Made by an Official of a Labor Organization to an Employer in Order to Induce the Latter to Refrain From Taking Certain Action, and Which the Former Refrains From Doing, Do Not Constitute a Violation of Section 303, LMRA.

Subsection (a) of Section 303, LMRA, in so far as its provisions are pertinent herein, makes it unlawful in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the *employees* of any employer to engage in, a strike or concerted refusal in the course of *their employment* to use, manufacture, process, transport, or otherwise handle or work on any goods, article, materials or commodities or to perform any services, where an object thereof is forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, etc.

Subsection (b) of said Section 303 provides that "whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States," etc.

As its title and subject matter indicate, said Section 303 relates to what is commonly known as secondary boycotts and to jurisdictional strikes. It will be observed that in order for a labor organization to violate the portions of Section 303 above quoted—being the only portions of said section which Petitioners contend have any application herein—it is necessary that such labor organization either engage in, or induce or encourage *employees* to engage in,

a strike or concerted refusal in the course of their employment to use, manufacture, etc., or otherwise handle or work on any goods, etc., or to perform any service where an object of such strike or concerted refusal results in, or might result in, a jurisdictional strike.

Petitioners contend that the Court of Appeals erred when it held that "a mere threat of a strike or concerted refusal to work made by a union to an employer" is not actionable under said Section 303. It is alleged in The Complaint that Labor Respondent International Alliance, etc., on August 31, 1946, notified Employer Respondents that it would not conform to or abide by the terms of the so-called "clarification" described in The Complaint [R. 20], "and threatened action against them accordingly." [R. 21.] According to Exhibit "D-1" attached to The Complaint [R. 81], Richard F. Walsh, International President of Respondent International Alliance, etc., on August 22, 1946, was present at a meeting of the Labor Committee of Employer Respondents, and, according to minutes of such meeting, constituting said Exhibit "D-1," he advised that "any company that makes one single change in the administration of the A.F.L. directive [award] in compliance with the new interpretation [clarification] will have all work stopped in the studios, exchanges, and theatres." We submit that the plain language of Section 303 makes it clear that mere threats of economic reprisals of themselves, by the representative of a labor union to an employer group, particularly where the employer group yields to such threats, do not violate said Section 303, for

the reason that same do not constitute an inducement or an encouragement *to any employees* to engage in a work stoppage, concerted refusal to work, or a strike. (*Humphrey v. Teamsters' Union* (D. C. N. Y.), 25 LRRM 2318; *In re Electrical Workers,* 82 NLRB No. 132; *In re Teamsters' Union,* 87 NLRB No. 130; *In re Spokane Building and Trades Council,* 89 NLRB No. 141.)

There is a further compelling and conclusive reason why the District Court did not have jurisdiction under Section 303, LMRA, and why none of the causes of action alleged in The Complaint stated a claim under said section upon which relief could be granted, namely, the fact that all of the acts of Respondents of which Petitioners complain occurred prior to the enactment of LMRA, 1947, and particularly said Section 303 thereof. LMRA, 1947, was enacted into law on June 23, 1947, and on that date the provisions of Section 303 became effective. Prior to June 23, 1947, there was no Federal statute which made unlawful acts and conduct, on the part of a labor organization, prohibited by said Section 303, and prior to that date there existed no Federal law permitting actions for damages on the part of persons injured in their business or property as a result of certain conduct by labor organizations, which, for the first time, was by LMRA made unlawful.

The "initial act towards the accomplishment of the conspiracy," of which Petitioners complain, occurred in April, 1945. [R. 16.] The alleged conspiracy was temporarily suspended "during the period of October 15-24, 1945"

[R. 17], and continued at meetings of the Employer Respondents held August 22, September 3, 11, and 12, 1946, on which dates the Employer Respondents, according to Petitioners, "formulated and agreed upon a uniform plan of procedure whereby such employer defendants [Respondents] would deprive all plaintiffs [Petitioners], and said class of persons, of their work tasks, and of their aforesaid contractual rights, etc." [R. 21-22.] Petitioners further alleged "that on or about September 23, 1946, said plan was put in effect by the defendants" [R. 22], "whereupon said employer defendants unlawfully discharged from all their work tasks not only those plaintiffs and members of said class who were directly involved but also those plaintiffs, and members of said class not directly involved, and uniformly ordered all of them then at work, to discontinue their work tasks and immediately leave and depart from said studios and premises of said defendants in a mass lockout of plaintiffs and the class, etc." [R. 23.] The last act in the asserted contractual violation, therefore, occurred on September 23, 1946, which was exactly *nine months prior to Section 303, LMRA, 1947, being enacted.* Accordingly, the Labor-Management Relations Act of 1947, and particularly Section 303 thereof, could not vest jurisdiction in the District Court unless it were given a retroactive effect. It is settled, however, that unless a statute is by its terms specifically given retroactive effect, its effect will be prospective only. (*Shwab v. Doyle,* 66 L. Ed. 747, 258 U. S. 529, 42 S. Ct. 391; *Neild v. District of Columbia,* 110 F. 2d 246, 254.)

III.

District Court Had No Jurisdiction to Review Action of National Labor Relations Board or Action of California Employment Commission.

Petitioners' contention that the allegations of the Third Cause of Action vested jurisdiction in the District Court over the subject matter thereof under the Federal Civil Rights Statutes, or Amendments V and XIV of the Constitution of the United States, or the National Labor Relations Act, has been determined adversely to them in the *First Schatte Case,* and no further comment on this phase of the litigation is, by us, deemed necessary. So far as Labor Respondent International Alliance, etc., is concerned, it suffices to point out that it is a labor organization in competition with the Carpenters Union, of which Petitioners, etc., are members; it is not now and never has been an employer of Petitioners, and, of course, is not, pursuant to any law, obligated to bargain with Petitioners on any subject. That the Respondents *induced* the National Labor Relations Board to reject, as lacking in merit, unfair labor practice charges filed by others, not Petitioners, and *induced* the California Employment Commission to deny Petitioners unemployment and disability benefits, in no manner vested jurisdiction in the District Court. The statutes of the State of California provide remedies whereby a judicial review may be obtained of the action of any of the California State Administrative agencies; United States District Courts have no jurisdiction in this field and neither do they have jurisdiction in an action brought for damages upon the theory that a state agency was, in some fashion not disclosed, other than by the vague word "induced," brought to the conclusion that a party did not have a meritorious claim for

unemployment and disability benefits. There is no law—either the Labor-Management Relations Act, 1947, or any other Federal statute—which gives District Courts of the United States the right to review the actions of the National Labor Relations Board when, in the exercise of its lawfully vested discretion, it determines that unfair labor practice charges lack sufficient merit to warrant issuance of an unfair labor practice complaint.

IV.

No Conspiracy or Effectuating Acts in Violation of the Anti-Trust Laws Are Alleged.

The Fourth Cause of Action, being the only cause of action in The Complaint which alleges a violation of the anti-trust laws, incorporates, by reference, Paragraphs II to XL of the First Cause of Action. These allegations of The Complaint may be summarized as follows: (a) jurisdiction arises under Title 27, U. S. C. A., Section 1343, and under the Sherman and Clayton Acts; (b) Petitioners had been employed or were eligible for employment as carpenters in the motion picture studios of Employer Respondents under certain collectively bargained agreements described in and attached to The Complaint as exhibits; (c) as a result of an unlawful conspiracy, combination, or confederation, in violation of the Sherman and Clayton Acts, entered into between Labor Respondents and Employer Respondents, Petitioners were deprived of their work tasks upon which they were engaged or for which they were eligible, and such work tasks were given to members or permittees of Labor Respondent International Alliance, etc.; (d) Petitioners were discharged, laid off, and boycotted, with resultant loss of wages; (e) Respondents "caused" the independent producers to "boycott cer-

tain plaintiffs" employed or eligible to be employed by such independent producers and to employ, in place and stead of Petitioners, persons who were members or permittees of Labor Respondent International Alliance, etc.; (f) a large part of the members or permittees of Labor Respondent International Alliance, etc., which the independent producers were "so compelled" to employ were and are less competent workers than Petitioners, so that the independent producers were required to and did employ a great many more persons in the performance of carpenter work in their respective studios than they would otherwise have been required to do, with the result that the cost of production by said independent producers has been materially increased and the profits reduced accordingly; (g) Employer Respondents are well able to absorb and bear such increase in cost of production and consequent loss of profits, but that many of the independent producers are not, and when the competition of the independent producers, or a substantial number thereof, has been eliminated, Employer Respondents intend to and will pass on the amount of their increased costs and attendant loss of profits by increasing the price of their products in amounts agreed upon, which must ultimately be borne by the several theatre owners who exhibit the same and the public, including Petitioners, who patronize the theatres; (h) the alleged conspiracies, and each of them, have been in restraint of trade and commerce among the several states and with foreign nations, within the meaning of the Sherman Act; and (i) Petitioners have been injured in their business and property by reason thereof, within the meaning of the Clayton Act.

It is not alleged that a purpose of the conspiracy was to control markets or fix prices in commercial competition;

the acts taken or agreed to be taken, in order to effectuate the alleged conspiracy, did not and could not tend to so result.

The alleged conspiracy between Employer Respondents and Labor Respondents, which, say Petitioners, pursuant to its purpose, resulted in loss of employment with attendant loss of wages by Petitioners, through discharge, lay-off, or boycott by Employer Respondents and independent studios, and the transferring of such employees' work tasks —whether being performed by them or for which they are eligible—to members or permittees of Labor Respondents, is not *forbidden* by the anti-trust laws. Acts stemming from such a conspiracy may constitute torts or contractual violations or unfair labor practices, but neither the conspiracy nor such acts constitute restraint of trade. Such a "conspiracy" is nothing more than a closed-shop agreement, valid under the National Labor Relations Act and under the laws of the State of California. (*Colgate-Palmolive-Peet Company v. National Labor Relations Board*, 338 U. S. Adv. No. 3, 94 L. Ed. 127.) Even the synchronization of a closed-shop contract and an arbitrarily closed union does not give one, who, by reason thereof, is deprived of his livelihood, a cause of action under the anti-trust laws. (*Courant v. International Photographers*, United States Court of Appeals, Ninth Circuit, 176 F. 2d 1000-1002, certiorari denied January 16, 1950, (Adv.) 94 L. Ed. 294.)

Furthermore, carpenter work in the motion picture studios is neither intrastate nor interstate trade or commerce. It is not a commercial activity; it is labor. "Dyeing and dressing furs do not constitute trade or commerce but only the performance of labor." (*United States v. Fur Dressers' & Fur Dyers' Ass'n.*, 5 F. 2d 869 at 872.)

Whether one or another group of men does the carpenter work in the motion picture studios constitutes a mere private controversy, local in character (*Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290)—in which the public has no interest and from which it can suffer no injury—and in no manner restrains or tends to restrain interstate commerce.

Competition between labor organizations which results in the members of one of them obtaining the work formerly performed by members of the other does not give rise to any cause of action under the anti-trust laws. (*United States v. Hutcheson,* 312 U. S. 219, 85 L. Ed. 788; *U. S. v. Carrozzo,* 37 Fed. Supp. 191, affd. 313 U. S. 539, 85 L. Ed. 1508; *Terrio v. S. N. Nielson Const. Co.,* 30 Fed. Supp. 77.) A mere private controversy between parties, even though it grow out of a conspiracy and result in some form of actionable wrong, does not permit a party injured thereby to recover treble damages under Section 15, Title 15, U. S. C. A., unless, first, the conspiracy is in restraint of trade, and, secondly, of equal importance, there is present in the circumstances a public detriment or injury.

After having summarized the allegations of The Complaint the Court of Appeals below, in its opinion (182 F. 2d at 167), stated: "These alleged acts do not constitute a violation of the anti-trust laws." In support of this statement, it was pointed out that "this is made clear by the Supreme Court in *Apex Hosiery Co. v. Leader,* 1940, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044, in a detailed discussion of the types of acts which constitute restraints of trade within the contemplation of those laws." The Court of Appeals then quoted from the decision of this Court in the *Apex* case and concluded that "compelling others to adopt certain employment

policies is not a restraint upon commercial competition" in the sense as defined by this Court in the *Apex* case. The Court of Appeals below then distinguished the *Apex* case from the *Allen-Bradley* case by pointing out that in the latter the conspiracy extended beyond the imposition of labor standards to the control of prices and marketing conditions, whereas in the *Apex* case this Court had stated plainly that restraint of trade in the anti-trust laws had never been applied in any case, whether or not involving labor organizations or activities, unless the Court "was of the opinion that there was some form of restraint upon commerial competition in the marketing of goods or services," and that elimination of price competition based on differences in labor standards is the objective of any national labor organization "but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

The language of the Court below and the reasoning which it expresses is fully sustained by what this Court said in the *Apex* case, from which we quote as follows:

> " 'In the cases considered by this Court since the Standard Oil case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and *in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price.* It was in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. *Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough,*

unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.'" (310 U. S. at 500-501.)

* * * * * * * * *

"But this effect on competition [elimination of price competition based on differences in labor standards] has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549, *supra; cf.* American Steel Foundries Case, *supra* (257 U. S. 209, 66 L. ed. 199, 42 S. Ct. 72, 27 A. L. R. 360); National Assoc. of Window Glass Mfrs. v. United States, 263 U. S. 403, 68 L. ed. 358, 44 S. Ct. 148. And in any case, *the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended effect on price or price competition."* (310 U. S. 469-504, 84 L. Ed. 1313-1329.) (Emphasis ours.)

The difficulty with the position of Petitioners is that they fail to realize that not all conspiracies between groups of competitors having for their purpose the injury or even elimination of another competitor—whether a labor organization be or not be a party to such conspiracy—are in violation of the anti-trust laws. Acts effectuating conspiracies which injure so as to permit recovery of threefold damages are those, and only those, which have for their purpose or create an actual or intended effect on price or price competition or control of markets in commercial competition. It is not even suggested in The Complaint that the intent or necessary effect of the conspiracy directed

against the independent producers or of the acts effectuating such conspiracy was to control markets or fix prices in commercial competition. Hence, we repeat, The Complaint herein does not set forth a conspiracy in violation of the anti-trust laws.

Conclusion.

Respondents The International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada and Roy M. Brewer respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950.
Nos. 222 and 223.

OSCAR SCHATTE, *et al.*,

Petitioners,

vs.

IATSE, *et al.*,

Respondents.

STUDIO CARPENTERS LOCAL UNION No. 946, etc.,

Petitioners,

vs.

LOEW'S, INCORPORATED, *et al.*,

Respondents.

Consolidated Brief of Petitioners in Reply to Opposition Briefs of Respondents.

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Respondents.

Consolidated Brief of Petitioners in Reply to Opposition Briefs of Respondents.

Statement.

Reference is respectfully made to the reply brief, being filed concurrently herewith, in Case No. 224, to show the extreme error into which the Court below was led.

This reply brief, in Cases Nos. 222 and 223, is consolidated to avoid repetition, and because the two cases arise from the same subject matter, and are brought for the same class.

The *Schatte* case, No. 222, is a true class action under Rule 23(a)(3) of the Rules of Civil Procedure,[1] and would have sufficed, but the *Union* case, No. 223, had to be brought in the effort to save time in obtaining a day in court for the class.

Reference is respectfully made:

1. The collective agreements [Schatte R. 11-15].

2. The 1945 conspiracy of respondents to replace all petitioners and their class with the IATSE, in violation of said agreements, and the repudiation thereof by the AFL [Schatte R. 15-17].

3. The September, 1946, renewed conspiracy of respondents to lay off, replace and lock out all petitioners and their class, upon the pretense of a sham dispute, and for the purpose of depriving petitioners of their closed shop and wages, hours and working conditions provided in said collective agreements [Schatte R. 21-22, 59].

4. The excerpts from the minutes of the meetings of the employer respondents' labor committee [Schatte R. 22, 81-102], given in the appendix of the Schatte petition (pp. 48-51), show the conspiracy of respondents, and the sham and fraud used, to lay off all petitioners and their class, and replace them with the IATSE, in violation of their collective agreements.

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[1]"Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

5. The pretense of respondents that they were adhering to the Exhibit "C-3" award, or directive, of the AFL Committee [Schatte R. 19, 73], in disregard of the fact that by its terms petitioners' jurisdictional right to carpenters' work was recognized as including "1. All trim and mill work on sets and stages"; "2. All mill work and carpenter work in connection with studios"; "3. All work in carpenter shops"; "4. All permanent construction"; and "5. All construction work on exterior sets" [Schatte R. 75-77]; and in further disregard of:

6. The Exhibit "C-4" clarification by said AFL Committee [Schatte R. 21, 78] stating that "It is clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction" [Schatte R. 79];

7. The ruthless conduct of the respondents, in the particulars alleged, in carrying out their conspiracy and fraud [Schatte R. 22-25, 26-30, 31-32, 33, 134; *Union* case, R. 46-48, 49-61], as hereinafter referred to.

8. The fraudulent motive, intent and effect of the conspiracy and action of respondents in removing petitioners and their class from their work tasks, laying them off, and locking them out, from September 23, 1946, to the present time, *without discharging them,* as particularly alleged in the *Union* case, paragraphs XV-XIX [R. 47-48].

9. The deprivation of the rights of petitioners and their class to their work tasks under their jurisdictional contract [Schatte R. 36], of their then legal closed shop agreement based thereon [Schatte R. 13, 52], and of their wage scale, six-hour day, and working conditions [Schatte R. 14, 59], and agreement to bargain [Schatte R. 15, 55-56].

10. The conspiracy and action of employer respondents in causing the California State Unemployment Insurance authorities to deny petitioners and their class their right to hearings, under the Constitution and provisions of the Social Security Act, upon their claims for unemployment compensation and disability benefits (Union Case 50-61).

11. The refusal of employer respondents, subsequent to the enactment of the Taft-Hartley Act, to bargain within the terms of the Exhibit "B-9" Interim Agreement [Schatte R. 55-56], or to end said lockout [Schatte R. 27].

I.

Reply to Point I-(1) in Opposition Brief of IATSE Respondents (p. 6), in Union Case, No. 223. That "Labor Respondents Are Not Parties to Any Contract Described in Amended Complaint to Which Petitioner Is a Party" (p. 6).

1. Respondents' contention is based upon a misconception of Section 7 of the Wagner Act, as re-enacted in the Taft-Hartley Act, 29 USCA 157. The Section provides for collective bargaining by employees, "through representatives of their own choosing." The collective agreement becomes a contract between the employer and the employees, as the principal parties thereto, when the employees accept the collective agreement, as they do by accepting employment and working thereunder. *Yazoo & M. V. R. Co. v. Webb* (5 Cir., 1933), 64 F. 2d 902, at 903, as presented in the petition (Union Pet. 9-10, App. 7), and *Gatliff Coal Co. v. Cox* (6 Cir., 1944), 142 F. 2d 876, at 880 (Union Pet. 10, App. 9-10).

2. This established interpretation of Section 7 is tersely stated in *Graham v. Southern Railway Co.*, 74 Fed. Supp. 663, at 665.[2]

II.

Reply to Points in Opposition Briefs, Upon Question Stated in Brief of Employer Respondents in the Schatte Case (p. 13) of Whether the Complaint States "A Claim Within the Jurisdiction of This Court for Violation of Rights Arising Under Section 7 of the" Wagner Act.

This is in reply to employer respondents' Point IV (p. 13) and the IATSE respondents' Point III (p. 12) in their *Schatte* case briefs; and to the employer respondents' Point I-C (p. 12) and the IATSE respondents' Point I, in its subdivisions (4), (7) and (8) (pp. 16, 23, 27), in their *Union* case briefs, relative to said Section 7.

1. The Court below attempts, in the *Schatte* decision, to confine the right of action of petitioners to the occurrences of September, 1946, and thereby to limit the issues to the Wagner Act [R. 211], as follows:

> "The breach of contract alleged was total and absolute on or about September 23, 1946, and the cause of action, if any, for such breach occurred in its entirety at that time."

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[2]"(3) A bargaining agent under the National Labor Relations Act or under the Railway Labor Act is but an agent for a principal, * * * His principal is the entire group of employees whom the agent represents. This is made clear by Section 2 of the Railway Labor Act, and Section 7 of the National Labor Relations Act, which assure to employees the right 'to bargain collectively through representatives of their own choosing.' The important word in this connection is the word 'representatives' * * * He is clothed with all the rights of the representative, but is subject to all the fiduciary obligations of a representative."

And adopts the *Schatte* decision in the *Union* case [R. 118], and in the *MacKay* case [R. 97]. This reply point, therefore, relates only to the Wagner Act.

2. Cases arising under the Wagner Act come within the jurisdiction of the Court under 28 USC 1337. *AFL v. Watson*, 327 U. S. 582 (66 S. Ct. 761, 90 L. Ed. 873), at 591, as presented in the petition (Schatte Pet. 10, App. 27-28).

3. The collective agreements became complete when the petitioners, and their class, accepted employment and worked thereunder, and thereby became the principal party thereto. *Yazoo & M. V. R. Co. v. Webb (supra)*, and *Gatliff Coal Co. v. Cox* (*supra*), as quoted in the appendix to the Schatte petition (pp. 9-10, 11-13), and the second case of *Gatliff Coal Co. v. Cox* (6 Cir., 1945), 152 F. 2d 52, as quoted therein (pp. 12-15).

4. Petitioners, and their class, and each of them, therefore, have rights of action arising under the Wagner Act for the violation of their rights under their said collective agreements. The decision of the Court below, to the contrary, is in direct conflict with each of the following cases: *Yazoo & M. V. R. Co. v. Webb (supra); Gatliff Coal Co. v. Cox (supra); Gatliff Coal Co. v. Cox* (6 Cir., 1945), 152 F. 2d 52 (Schatte Pet. 11, App. 12); *Moore v. Illinois Central Railroad Company*, 312 U. S. 630 (61 S. Ct. 754, 85 L. Ed. 1089) (Schatte Pet. 10, App. 10).

II-A.

Re Holding of the Court Below, in the Schatte Decision [R. 215], That "The Exclusive Remedy for the Commission of an Unfair Labor Practice Was in Proceedings Before the National Labor Relations Board Under the Wagner Act."

5. Petitioners were deprived of their right of redress before the Labor Board by the bias and prejudice of the Field Examiner, who was a member of the accused IATSE, and of the General Counsel, as alleged in the Schatte Complaint, Second Count, paragraph VII-X [R. 27-30]. *N.L.R.B. v. Phelps* (5 Cir., 1943), 136 F. 2d 562 (Schatte Pet. 15, App. 32). Petitioners had no right of appeal from the General Counsel, by which to obtain a hearing before the Board. *Lincourt v. N.L.R.B.* (1 Cir., 1948), 170 F. 2d 306, at 307 (Schatte Pet. 15, App. 29). Petitioners' right to a day in court is recognized in the first case cited and relied upon by the employer respondents (p. 13). *Amazon Cotton Mill Co. v. Textile Workers' Union* (4 Cir., 1948), 167 F. 2d 183, at 190:[3]

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[3]"(12) We do not mean to say that unusual cases may not arise where courts of equity could be called upon to protect the rights of parties created by the act. *Cf.* Steel v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; A. F. of L. v. N.L.R.B., 308 U. S. 401, 412, 60 S. Ct. 300, 84 L Ed. 347. * * *"

II-B.

Re Holding of the Court Below, in the Schatte Decision [R. 215-216], That Although the Respondent IATSE "Would Not Have Been Subject to Unfair Labor Practice Charges" Under the Wagner Act "This Immunity From Proceedings Before the Board Would Not Make Them Subject to Liability in the Courts Because Judicial Relief Might Have Interfered With the Function of the National Labor Relations Board."

Citing *United Electrical Radio & Machine Workers v. International Brotherhood of Electrical Workers* (2 Cir., 1940), 115 F. 2d 488, which, at 491, distinguishes itself from the holding of the court below.[4]

6. The employer respondents, having acted in conspiracy with the IATSE respondents, were liable with them, just as the labor union defendant, otherwise exempt, was liable with its co-conspirators in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U. S. 797, (65 S. Ct. 1533, 89 L. Ed. 1939) (Schatte Pet. 14, 19, App. 26-27), page 810:[5]

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[4] "(4, 5) We do not hold that the plaintiff had no recourse to any court for the loss of its members; that may, or may not, be so. But if it has, the suit does not 'arise under the * * * laws of the United States.' * * * Sec. 7 does not protect a union against that kind of wrong committed by a competing union except as an incident to the determination by the Board of its right to act as a bargaining representative."

[5] "* * * Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." (P. 810.)

Having jurisdiction, upon the cause of action against respondent IATSE, the Court had jurisdiction of the entire subject matter. *Railroad Commission of the State of California v. Pacific Gas & Electric Company,* 302 U. S. 388 (58 S. Ct. 334, 82 L. Ed. 319), at 391:[6]

III.

Reply to Points in Opposition Briefs Relative to Jurisdiction, and Cause of Action, Under Section 301 of Taft-Hartley Act, 29 USCA 185.

This is in reply to the employer respondents' Point II (p. 7) and the IATSE respondents' Point I (p. 4) in their *Schatte* case briefs; and employer respondents' Point I-A (p. 4), and the IATSE respondents' Point I, in its several subdivisions (1), (2), (3), (5) (pp. 6, 7, 9, 18) in their *Union* case briefs, relating to said Section 301.

1. The ruling of the Court below is based upon erroneous holdings in the *Schatte* case,[7] adopted in the *Union* case decision [R. 118], and *MacKay* decision [R. 97].

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[6]"* * * Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. * * *"

[7]"We find it unnecessary to determine whether or not the complaint states a cause of action under Sec. 301 for the reason that said section was enacted subsequent to the alleged breach of contract in the instant case and the section is therefor inapplicable. * * *" [Schatte R. 210.]

"Thus, whatever breach of contract is alleged took place at least nine months before the enactment of the statute. * * * The breach of contract alleged was total and absolute on or about September 23, 1946, and the cause of action, if any, for such breach accrued in its entirety at that time. The general rule is that an employee who is discharged in violation of his contract of employment may sue only once and at that time recover all present and prospective damages. * * *" [Schatte R. 211.]

The errors of the Court below relative to Section 301 of the Taft-Hartley Act are presented in the petitions: Schatte Specifications 3, 4 and 5 (pp. 6-7), presented as reasons for certiorari in Points Third (p. 11), Fourth (p. 12), and Sixth (p. 14); Union Specifications 1 and 3 (p. 4), presented as reasons for certiorari in Points Second (p. 7) and Third (p. 9); and Mackay Specifications 1 and 2 (p. 6), presented as reasons for certiorari in Points First (p. 8), Second (p. 9), Third (p. 10), Fourth (p. 11), and Fifth (p. 11).

III-A.

Employment Not Terminated by Layoff and Lockout.

The complaints do not allege that petitioners and their class were discharged from their employment on September 23, 1946, as assumed by the Court below. To the contrary:

The Schatte complaint alleges that "said employer defendants unlawfully discharged" them "from all of their work tasks" [R. 23, Par. XXXV];

The Union complaint alleges that "said employer defendants uniformly ordered all of plaintiff's members then at work to discontinue their work tasks, and immediately leave and depart from said studios and premises of the employer defendants, in a mass lockout of all of plaintiff's members. * * * "but that the employment of plaintiff's members has never been terminated" [R. 47, Par. XVI]; and

The MacKay complaint alleges that the employer defendant "ordered plaintiff, and all said other employee members of Local 946, from their work tasks, and forced

them to immediately leave its premises, without discharging them, or terminating their employment," etc. [R. 23; Par. XI].

Furthermore, the Second Count in the Union case shows that the employer respondents have held petitioners and their class as off-payroll employees, upon the false and fraudulent charge that they left their work on account of a trade dispute, as the means of causing the State Unemployment authorities to deprive them of their right to unemployment compensation and disability benefits [R. 49-61].

III-B.

Respondent Employers Refused to Bargain After Enactment of Taft-Hartley Act.

While holding petitioners and their class as employees, and wrongfully retaining the IATSE in carpenters' work tasks, the employer respondents refused to bargain with petitioners, or their agents, on July 3, 1947, subsequent to the enactment of the Taft-Hartley Act [Schatte R. 27, Pars. V-VI; Union R. 48, Par. XVIII]. The actions, therefore, come under the Taft-Hartley Act.

The holding of the Court below to the contrary is in direct conflict *United States v. Trans-Missouri Freight Association,* 166 U. S. 290 (17 S. Ct. 540, 51 L. Ed. 1007), and *NLRB v. Local 74, etc.* (6 Cir., 1950), 181 F. 2d (Adv.) 126; and *AFL v. Western Union Telegraph Co.* (6 Cir., 1950), 179 F. 2d 535, as cited in the Schatte petition (pp. 12-13) and quoted more fully in its appendix (pp. 15, 16, 17).

IV.

Reply to Points in Opposition Briefs Relative to Jurisdiction, and Cause of Action, Under Section 303 of Taft-Hartley Act, 29 U. S. C. A. 187.

This is in reply to employer respondents' Point III (p. 10) and the IATSE respondents' Point II (p. 8) in their *Schatte* case briefs; and to the employer respondents' Point I-B (p. 11), and the IATSE respondents' Point I, in its subdivisions (3), (6) in their briefs in the *Union* case, relative to said Section 303 (pp. 9, 19).

1. Section 303 29 U. S. C. A. 187, provides:[8]

2. The ruling of the Court below, in the *Schatte* case, denies petitioners' right of action upon the ground that the threats made by respondent IATSE were not actionable.[9]

---

[8]"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to * * * handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class * * *.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties * * *."

[9]"* * * The statute does not make actionable a mere threat of a strike or concerted refusal to work made by a union to an employer. There must be either an actual work stoppage or an inducement or encouragement to employees to stop work. The I. A. T. S. E., according to the complaint, merely threatened that if

3. The threat was twofold [Schatte R. 81, 80], first, as shown in the minutes of August 22, 1946, of the employer respondents' labor committee, attended by Walsh and respondent Brewer of the IATSE;[10] and, second, in the letter of August 31, 1946, from President Walsh of the IATSE to the respondent Association of Motion Picture Producers.[11] Respondent IATSE, a "labor organization" thereby encouraged its member employees to strike, or act in "concerted refusal, in the course of their employment," by the employer respondents, to handle films, in the manufacture, distribution or exhibition thereof, with the object of forcing and requiring the employer respondents to give the IATSE the carpenters' work belonging to petitioners and their class under the collective agreements to which the IATSE was a party.

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employer appellees did not comply with certain demands, then the I. A. T. S. E. would induce certain employees to stop work.

"Since no act is alleged that is wrongful under Sec. 303(a), we need not consider whether the alleged acts took place or continued after the enactment of that section."

[10]"Later: Walsh advises that any company that makes one single change in the administration of the A.F.L. directive in compliance with the new interpretation will have all work stopped in the studios, exchanges and theatres." [Schatte R. 81.]

[11]"I have received from President Green of the American Federation of Labor a communication inclosing a copy of a statement described as 'clarification' of the decision in the Hollywood jurisdictional dispute, made by Vice Presidents Knight, Birthright and Doherty, dated December 26, 1945. * * *

"If the Committee's decision as originally rendered is not fully complied with by you this International Alliance will take such action as may be necessary to protect its interests." [Schatte R. 80.]

4. "Whoever shall be injured in his business or property" by violators of Section 303(a) are given a cause of action in the federal court, as was correctly found by the Court below.[12]

5. The error of the Court below is specified in 6 (p. 7), as presented under the Fifth reason for granting the writ in the Schatte petition. The decision of the Court below is directly in conflict with the decision cited there (p. 14) and quoted more fully in the appendix thereto (pp. 4, 26, 43).

V.

Reply to Points in Opposition Briefs Relative to Jurisdiction, and Cause of Action, Under Civil Rights Act; 28 U. S. C., 1343 (1) (3); 8 U. S. C. A., 43, 47(3); Social Security Act 301, 302, 303, 405(a); 42 U. S. C. A., 501, 502, 503; 26 U. S. C. A., 1603(a)(4)(5).

This is in reply to employer respondents' Point V (p. 15) in their *Schatte* case brief, and Point II (p. 12) in their *Union* case brief; and the IATSE respondents' Point II (p. 31) in their *Union* case brief.

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[12]"* * * An action under Sec. 303(b), therefore, clearly arises under a law of the United States within the meaning of 28 U. S. C. A., Sec. 1331, and under an Act of Congress regulating commerce within the meaning of 28 U. S. C. A., Sec. 1337. Both Sec. 1331 and Sec. 1337 grant jurisdiction to federal district courts without any requirement of diversity of citizenship." [Schatte R. 214.]

1. The Court below held in the *Schatte* case [R. 217] that no cause of action was shown under the Civil Rights Act[13] and held in the *Union* case decision [R. 119]:[14]

2. The allegations in the Schatte complaint are contained in paragraph VII of the Third Count [R. 32];[15] and the allegations in the Union complaint are contained in its Second Count [R. 50-61]. They certainly allege all that is required. It is submitted that the decision of the Court below is directly in conflict with the cases cited under reason Seventh in the Schatte petition (pp. 15-16), and under reason Fifth in the Union petition (pp. 12-13).

---

[13]"8 U. S. C. A., Sec. 43 is inapplicable because appellees are not alleged to have deprived appellants of rights while acting 'under color of any statute, ordinance, regulations, custom or usage, of any State or Territory.' The reason for the quoted phrase is to bring the wrongful acts within the scope of 'state action' under the Fourteenth Amendment. To be liable under this section, therefore, appellees would have had to act, or to purport to act, on behalf of the state as state officials, or, possibly, to conspire with persons so acting. * * *"

[14]"8 U. S. C. A., Sec. 43 is inapplicable because appellees are not alleged to have acted under color of any state or territorial law, custom or usage. 8 U. S. C. A., Sec. 47(3) is inapplicable because there is no allegation tending to show that appellant's members were hindered in any way from presenting their claims and contentions to the proper authorities and having those claims ruled upon in a proper, orderly manner. * * *"

[15]"That by the same means defendants induced certain public officials of the State of California, viz., in the California Employment Commission, to deny certain of plaintiffs, and of said class of persons, a full, fair, open and impartial hearing upon their respective claims for unemployment and disability benefits to which they are entitled, and of which they are being deprived, in violation of the Social Security Act, Section 303 (42 U. S. Code, 503), and of the California Unemployment Insurance Act, as amended, Section 70, and of the Regulations thereunder, Article 31, Sections 310 and 315, and in violation of the said Civil Rights Act, Section 1980, of the Revised Statutes of the United States (Title 8, U. S. Code, Section 47)." [Union R. 32.]

V-A.

Conduct of State Officials, Caused by Employer Respondents, Repugnant to State Law and Decisions.

Reference is made to the Sixth reason in the Union petition (p. 13) and to the laws and decisions cited thereunder (pp. 13-15); to the text quotations from the Social Security Act (App. pp. 3-5); to the California Act (App. p. 6), and the cases cited (App. pp. 20, 21, 22).

V-B.

Conduct of State Officials, Caused by Employer Respondents, Repugnant to Fourteenth Amendment.

Reference is made to the Schatte petition, the Eighth reason (p. 17), and to the decisions of this Court cited there (p. 17) as quoted in the appendix thereto (pp. 34, 32); and to reason Eighth in the Union petition (p. 16).

It is respectfully submitted that the decision of the Court below is repugnant to the Fourteenth Amendment, under *Ohio Bell Telephone Company v. Public Utilities of Ohio,* 301 U. S. 292 (67 S. Ct. 724, 81 L. Ed. 1093).

VI.

Reply to Point VI in Employer Respondents' Brief in Schatte Case (p. 19) and Point IV in IATSE Respondents' Brief (p. 13), Re Right of Action Under Sherman and Clayton Acts.

Reference is made to reason Tenth in the Schatte petition (p. 18), and the cases there cited, and more fully quoted in the appendix at the pages indicated. The ruling point in the case is upon the specific holding in the decision of the Court below [R. 220].[16]

That conclusion is in direct conflict with the cases cited (Pet. 19), and more fully quoted at the appendix pages indicated. The employment of petitioners and their class had been business and property through the many years of their faithful service under their collective agreements and contracts of employment.

It is respectfully submitted that the time has come for this Court to determine once and for all that these contracts rights of workers constitute property within the meaning and protection of the Sherman and Clayton Acts.

---

[16]"Another reason why no cause of action is stated under 15 U. S. C. A. 15 is that no damage to their business or property which stems from a conspiracy in violation of anti-trust laws is alleged. The loss of their rights of employment is not a result of any lessening of commercial competition among the studios."

VII.

The Closed Shop Agreement Was a Seniority Agreement.

It is submitted that this is manifest.

Yazoo & M. V. R. Co. v. Webb (supra), states, at page 904:

> "* * * a worker cannot be discharged for causes prohibited by the agreement or without a hearing if that is provided, and the agreed seniorities must be observed in promoting, laying off, or re-employing men."

The decisions of the Court below are basically in conflict with this well considered and sound statement of law.

Conclusion.

Petitioners pray that a writ be granted.

Respectfully submitted,

ZACH LAMAR COBB,
Counsel for Petitioners.

Office - Supreme Court, U.
FILED
SEP 13 1950

IN THE

Supreme Court of the United States

October Term, 1950
No. 222

OSCAR SCHATTE, *et al.*,

Petitioners,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Respondents.

Motion for Leave to File Briefs Amicus Curiae on Behalf of Petitioners.

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IN THE

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Motion for Leave to File Briefs Amicus Curiae on Behalf of Petitioners.

Applicants are Conference of Studio Unions, an unincorporated association, International Association of Machinists, Local 946 of United Brotherhood of Carpenters & Joiners, Local 852 of Brotherhood of Painters, Decorators & Paperhangers of America, Local 1185 of International Association of Machinists, Local 374 of International Molders & Foundry Workers of America, Local 644 of Brotherhood of Painters, Decorators & Paperhangers of America, Local 14 1 of Brotherhood of Painters, Decorators & Paperhangers of America, Local 108 of Sheetmetal Workers Union and Henry J. Kistner.

Applicants respectfully move this Court for Leave to file, as *amicus curiae* on behalf of petitioners, a brief prior to consideration of the pending petition for certiorari and for leave to file a brief on the merits.

In Appendix A hereof there are reprinted consents of some respondents that such briefs may be filed. Other respondents and petitioners have declined to grant such consent.

Statement in Support of Motion.

Nature of Applicants' Interest

Applicants are plaintiffs in an action entitled *Conference of Studio Unions, et al. v. Loew's Incorporated, et al.*, numbered 7306-WM, now pending in the United States District Court for the Southern District of California, Central Division. (For convenience that action is here referred to as the *Conference Suit.*)

That action was filed on the 7th day of July, 1947. It has been set for trial on several occasions, but it has not yet been tried. Trial was postponed most recently because of the decision rendered by the Court of Appeals for the Ninth Circuit in the case of *Schatte et al. v. IATSE et al.*, the subject of the pending petition for certiorari.

The *Conference Suit* grew out of many of the incidents which are alleged in one of the causes of action in the *Schatte case,* particularly the Fourth Cause of Action of the Amended Complaint. The plaintiffs in the two cases, that is in the *Conference Suit* and in the *Schatte case,* are different persons, but their situations have many similarities; the principal defendants in the two cases are identical.

Commencing in 1946 joint action by the major motion picture producers (all of whom are defendants in both cases) resulted in throwing thousands of employees out of work, many of them permanently, and in destroying a

number of labor unions which until that time had served various crafts in the motion picture industry and had enjoyed a reputation for integrity and fair dealing. Some of the incidents which are the subject of the *Schatte case* as well as of the *Conference Suit* have been explored by a Congressional investigation. (See hearings before a special sub-committee of the Committee on Education and Labor, House of Representatives, 80th Congress, first session, pursuant to H. Res. 111.) Plaintiffs in the *Schatte case* were among the many who suffered losses as a result of those events, and their suit was a search for redress for those losses.

Applicants include a number of labor unions, an unincorporated association of those unions, and a member of one of those unions who sues as one of a class for the benefit of other displaced employees similarly injured. Pursuant to leave of Court petitions in intervention on behalf of several hundreds of employees have been filed in the *Conference Suit*.

The complaint in the *Conference Suit* was filed before the amended complaint in the *Schatte case* was filed. The *Conference* complaint alleges a violation of the Sherman Act, and prays for damages and an injunction. Briefly stated, that complaint alleges a conspiracy between a group of employers and a group of labor unions by which the conspiring employers agreed to destroy another group of labor unions, to discharge members of those unions, and to give their jobs to members of the conspiring unions; in exchange for this agreement, the conspiring unions agreed to discriminate against smaller motion picture producing companies, known in the industry as the Independents, in wage scales and in the quality of labor to be furnished to the Independents in order to destroy their

competing power; and all the conspiring motion picture producers agreed to cooperate in order to hoard completed film, to extend the playing time of film exhibited to the consuming public, to reissue previously exploited film, and to delay the exhibition of new film to the public, in order to stretch the completed motion picture film over the period of the scarcity anticipated from the discharge of members of the non-conspiring unions. For the financial losses suffered by the unions, their association, and their members, the plaintiffs seek damages which in the total aggregate millions of dollars. (The operative paragraphs of the *Conference* complaint are set out in the Appendix.)

Motions to dismiss prior complaints in the *Schatte case* have been granted with leave to amend before the *Conference Suit* was filed; successive motions to dismiss the *Conference* complaint have consistently been denied. Internal evidence gathered from comparing the last complaint in the *Schatte case* with the *Conference* complaint, together with the fact that the *Schatte* complaint was filed after the *Conference* complaint would support the conclusion that the *Schatte* complaint was an attempt to model, with some variations, its allegations after the allegations of the *Conference* complaint. This fact is germane because the decision in the *Schatte case* has affected the proceedings in the *Conference Suit* already. In May, 1950, when the Court of Appeals announced its opinion affirming the order of the District Court dismissing the *Schatte* complaint, the defendants in the *Conference Suit* immediately filed motions for judgment on the

pleadings based largely on language contained in the opinion of the Court of Appeals.

At the time of writing this statement in support of the motion, the District Court has not ruled on those motions in the *Conference Suit,* but has postponed the trial date, has indicated its uncertainty as to the meaning and effect of the opinion of the Court of Appeals in the *Schatte case,* and has urged applicants to participate in a petition for re-hearing before the Court of Appeals for the purpose of clarifying the uncertainties in that Court's opinion. (See Appendix.) Applicants have sought to comply with the suggestion of the District Court. The appellants in the *Schatte case* did not however file a petition for re-hearing, but instead have petitioned this Court for a writ of certiorari thereby staying all proceedings in the Court of Appeals. One appellant, Paul Hinst sought to sever from the remaining appellants for the purpose of filing a petition for re-hearing; but the Court of Appeals denied a motion which would have permitted such severance. (See Appendix.)

The foregoing indicate the reasons for and the nature of the interest of applicants in the petition for certiorari and in the disposition of the *Schatte case* on the merits. Denial of the petition would leave the opinion of the Court of Appeals as the final judicial utterance in that case, an opinion which the defendants in the *Conference* case assert entitles them to a judgment on the pleadings in a suit involving millions of dollars and the livelihood of thousands of employees, and which the Honorable William Mathes who has before him the *Conference Suit* has said appears ambiguous in critical aspects.

Questions of Law Which Have Not Been Presented.

Counsel for applicants have read the petition for writ of certiorari, and respectfully represent that the following questions, inescapable in a disposition of the case, have not been presented at all or have not been presented adequately.

1. Is it a violation of the Sherman Act if a group of employers combine with a group of unions to impose labor standards on a group of competing but smaller employers and the employers' purpose as well as the necessary result of such conspiracy is to destroy the ability of the smaller employers to compete? (This question does not appear to have been presented at all.)[1]

2. Even if the answer to question 1 is in the affirmative, is such conduct nevertheless a violation of the Sherman Act if the labor standards to be imposed on the smaller non-conspiring employers are more onerous, costly, and destructive than those which the conspiring union imposes on the conspiring employers? (This point appears not to be presented in the petition for certiorari.)

---

[1]The decision of the Court of Appeals in the *Schatte case* says that such conduct is not a violation of the Sherman Act, and relies on language of the *Apex* decision (310 U. S. 469) permitting a labor union to affect competition by imposing higher labor standards. But the opinion neglects the distinction between conduct on the part of a union acting alone and solely in its own interest and similar conduct brought about as a result of collaboration with a group of employers and for the purpose of destroying competition for the benefit of the employer-conspirators. (*Cf. Allen-Bradley Co. v. Local Union No. 3*, 325 U. S. 797.)

3. Is the loss of a job, as a direct result of a violation of the Sherman Act, an injury to business or property under 15 U. S. C. A., Section 15, to permit an award of damages? (This point is adverted to in the petition for certiorari, pp. 18-19, 44; it is submitted that the presentation is inadequate.)

4. If a group of employers who hire almost all employees in a given industry within the United States carry out an agreement in violation of the Sherman Act which excludes employees from that industry, are the excluded employees entitled to damages under the Sherman Act? (This question does not appear to have been presented in the petition for writ of certiorari.)

In view of the fact that the *Schatte case* was decided on the pleadings, only questions of law are involved.

Conclusion.

Four years after the commencement of the 1946 controversies between Hollywood's major motion picture producers and their employees and the representatives of those employees the scars of those controversies have not yet been healed. Laborers and experienced craftsmen grown gray in the motion picture industry have been permanently dispossessed from the only occupations they know. The loss of wages over several years, borne only with the most severe hardships by persons unequipped to weather such periods, remains uncompensated and remains so far without hearing before any court. As often happens, these ques-

tions have finally found their way to a United States Court and await determination in a trial which has been postponed primarily, if not solely, because of the disposition of the *Schatte case.*

It is respectfully submitted that the interests of justice will be served if these applicants are granted leave to file briefs.

Respectfully submitted,

ROBT. W. KENNY and
MORRIS E. COHN,
Attorneys for Applicants.

APPENDIX.

Excerpts From Complaint in the Conference Suit.

XII.

Plaintiffs are informed and believed and on such information and belief allege that commencing in June of 1946, the exact time being unknown to the plaintiffs but well known to each of the defendants, the defendants combined and agreed each with the other for the purpose of destroying the Conference and the Member Unions, and for the further purpose of eliminating as competitors the motion picture production companies herein described as Independents. As part of the said combination and agreement, and in order to carry out the purpose aforesaid, the defendants agreed:

(a) Until the purposes of the combination and agreement had been accomplished, each of the defendant Majors would refrain for as long a period as possible from releasing for distribution or exhibition to the public motion pictures produced by it and theretofore unreleased.

(b) Each of the defendant Majors would endeavor to exact from exhibitors agreements requiring the latter to run motion pictures for longer periods of time than had been the practice prior thereto.

(c) In theaters owned or controlled by any of the defendant Majors, motion pictures produced by any of the Majors would be run for longer periods of time than had been the practice prior thereto.

(d) Each of the defendant Majors would prepare for reissue to distributors and to exhibitors motion pictures previously exploited and exhibited and theretofore withdrawn from exhibition, and would endeavor to persuade

distributors and exhibitors to accept reissued motion pictures in lieu of motion pictures not previously exhibited.

(e) Each of the defendant Majors would cease to employ any person who was on said date a member of any of the following unions, to wit: Local 946, Studio Carpenters; Local 1185, Cinema Lodge; Local 644, Moving Picture Painters; Local 278, Janitors; Local 1488, Story Analysts; and Local No. 1421 Screen Set Designers. In September, 1946, Local 278, Janitors and Local 1488, Story Analysts were members of the Conference. The defendant Majors agreed that they would not engage any such person unless he had either given up his membership in his said union or had obtained a work permit card from a local of the IATSE.

(f) To do the work theretofore customarily performed for the defendant Majors by members of the unions named in subdivision (e) hereof, the Majors would thereafter employ only members of locals of the IATSE or persons who procured the written consent of a local of the IATSE.

(g) The defendant Majors would, until the purposes of the combination and agreement had been accomplished, curtail production and distribution of motion pictures to the extent necessary to carry out the said purposes and the agreements in this paragraph alleged.

(h) The IATSE would order and require its locals to furnish its most skilled members to render services only to the defendant Majors and to refrain from furnishing skilled members to any of the Independents unless and until all of the Majors were supplied with sufficient employees.

(i) The IATSE would order and require its locals to furnish to the Independents employees in the following

categories, each of which is indispensable to the production of motion pictures, cameramen, soundmen, film cutters, film editors, and electricians only at rates and under conditions higher and more onerous to the employer than the rates and conditions at which IATSE would offer such employees to the Majors.

(j) All of the defendants would meet again from time to time to communicate current information; until the accomplishment of the purposes of the combination and agreement none of the said defendants would act independly with relation to the Conference or any of its Member Unions or with relation to the Independents, but on the contrary would consult with all of the other defendants and take further steps only in accordance with the agreement of all of the defendants.

XIII.

Plaintiffs are informed and believe and on such information and belief allege that pursuant to the said combination and agreement the defendants have done the following:

(a) Commencing in June, 1946, and at all times since, each of the defendant Majors have hoarded motion pictures theretofore unreleased by them, and have delayed the release of pictures for distribution and exhibition to the public for periods substantially greater than had previously been the practice of the Majors.

(b) Commencing in June, 1946, and at all times since, each of the Majors has endeavored to exact, and has exacted, agreements from distributors and exhibitors requiring theater owners to run motion pictures for periods substantially longer in the case of each such motion pictures than had previously been the practice.

(c) Commencing June, 1946, and at all times since, in theaters owned or controlled by any of the defendant Majors, motion pictures produced by any of the Majors have been run for longer periods of time than had previously been the practice.

(d) Commencing June, 1946, the Majors have prepared for reissue and have reissued for distribution and exhibition in excess of seventy-five motion pictures previously exhibited and theretofore withdrawn from distribution and exhibition.

(e) Commencing on or about September 14, 1946, and during the period through November 15, 1946, each of the Majors discharged from its employ persons belonging to the Studio Carpenters, Local 946 and the Moving Picture Painters, Local 644.

(f) All of the defendant Majors have refused to negotiate labor agreements or to accept for work any persons belonging to the Story Analysts Guild, Local 1488 until the said union withdrew from the Conference; on or about the 20th day of March, 1947, the Story Analysts withdrew from the Conference; on or about the 31st day of March, 1947, members of the Analysts Guild went back to work at the studios of the respective defendant Majors.

(g) All of the defendant Majors refused to permit any members of the Janitors, Local 278 to report for work until it withdrew from the Conference; on or about August 19, 1946, the Janitors withdrew from the Conference, and thereafter members of the Janitors have been accepted for work at the respective studios of defendant Majors.

(h) All of the defendant Majors refused to permit any members of the Electricians, Local 40 to report for work until it withdrew from the Conference; on or about

January 31, 1947, the Electricians withdrew from the Conference; in March, 1947, members of the Electricians went back to work at the studios of the respective defendant Majors.

(i) Each of the Majors has curtailed the production of motion pictures. The total number of motion pictures completed by the defendant Majors during the period from June 15, 1945, to July 1, 1946, was 240; the number of motion pictures completed by the Majors during the period commencing June 15, 1946, to July 1, 1947, is 196.

(j) The IATSE has ordered and required its locals to, and such locals have, furnished skilled members to render services only to the Majors and have failed and refused to furnish any skilled members to render services to the Independents.

(k) The IATSE has offered to furnish to the Independents members to render services in the following categories, only at the following rates for employees who work without a guaranteed period of employment, to wit:

Feature Editor	$250.02 per week
Head Sound Effects	216.54 " "
Head Music	216.54 " "
Head Librarian	199.80 " "
Assistant Editor (guaranteed 48 hrs., time and half after 40)	136.24 " "
Librarian	119.86 " "
Cameraman	450.00 " "
Electrician	2.25 per hour

The rates and conditions for similar employees furnished to the Majors by the IATSE are:

Feature Editor (54 hr. schedule)	$222.22 per week
Head Sound Effects	191.16 " "
Head Music	191.16 " "
Head Librarian	173.86 " "
Assistant Editor (guaranteed 48 hours)	104.00 " "
Librarian (48 hours)	105.56 " "
Cameraman	375.00 " "
Electricians	1.91 per hour

In addition to the differences in the rates of compensation, as shown by the foregoing, plaintiffs are informed and believe and on such information and belief allege that in the case of some of the categories above alleged and others, the exact ones not being known to the plaintiffs but well known to the defendants, the IATSE demands of Independents that the weekly rate payable shall be paid in full for each separate motion picture on which any employee within such category has worked during the week; that no such demand or requirement is made of the Majors, but that the IATSE offers similar categories of employees to the Majors at weekly rates of compensation regardless of the number of motion pictures the employee works on during the week, and that such weekly rates of compensation are not more than the rates offered to the Independents for each motion picture worked on; that the result of the said difference in rates has been to require the Independents to pay salaries for

similar work as much as three times the rate paid by the Majors.

* * * * * * * * *

XV.

As a further direct result of the said agreement and combination the plaintiffs were injured in their respective businesses and property as herein shown:

(a) Plaintiff Henry J. Kistner was, on the 23rd day of September, 1946, discharged from his employment with the defendant Hal E. Roach Studio, Inc. He has not been able to regain employment at any of the defendant Majors at any time since. From the said 23rd day of September, 1946, to and including the 30th day of June, 1947, said plaintiff Kistner has lost in wages the sum of $4,693.38.

(b) By reason of the withdrawal of Local 1488, Story Analysts; Local 278, Janitors; and Local 40, Electricians from the Conference, the present monthly revenue of the Conference has been diminished by $450; and the Conference has to June 30, 1947, lost, by the loss of such revenue, the sum of $1,650. For the purpose of endeavoring to negotiate agreements between the defendant Majors and Member Unions, and for the purpose of endeavoring to reach agreement with defendant Majors for the rehiring of members of Member Unions, the Conference has expended the sum of $19,404.94.

(c) For the purpose of maintaining its members and in endeavoring to reach agreement with the Majors for the

rehiring of members, the plaintiff unions have expended sums in the amount herein alleged:

Local 644, Moving Picture Painters	$122,346.75
Local 852, Screen Cartoonists	40,603.48
Local 946, Studio Carpenters	167,529.25
Machinists, Cinema Lodge 1185	128,249.15
Local 1421, Screen Set Designers	88,045.00
Local 108, Sheetmetal Workers	12,000.00
Local 374, Molders	4,680.00

(d) By reason of their discharge from the employment with the defendant Majors and the refusal of the defendant Majors to reemploy members of Member Unions, the members have lost for the period from September 15, 1946, to and including June 30, 1946, in wages and salaries a sum which plaintiffs are informed and believe is $14,000,000.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, MAY 15, 1950, ON THE HEARING OF MOTIONS FOR JUDGMENT ON THE PLEADINGS IN THE CONFERENCE CASE.

The Court: The last paragraph of this opinion [in *Schatte v. IATSE,* affirming a judgment of dismissal]—I am just glancing at it hastily here; it was quoted in some of your briefs—reads:

> "Another reason why no cause of action is stated under 15 U. S. C. A., Section 15 is that no damage to business or property which stems from a conspiracy in violation of anti-trust laws is alleged. The loss of their rights of employment is not a result of any lessening of commercial competition among the studios."

That may be ambiguous as applied to this problem. It may be that the court might be induced, in view of the pendency of this action and the fact it promises to take up several weeks of the time of this court, to clarify its opinion. If it did not intend to pass upon the problem, say so; so that the problem can be here for decision and later, undoubtedly, before that court for decision if the opinion is adverse, I assume, to either side.

But it is a great waste of time and effort, gentlemen, to try this case, in the face of knowledge, or in the uncertain attitude of the Court of Appeals toward it.

If the plaintiffs prevail and the Court of Appeals is going to say, as it could say in three lines, that the plaintiffs lost their jobs as the proximate consequence of a violation of the anti-trust laws, true. If, however, loss of employment does not constitute damage to business or property within the meaning of the anti-trust laws, and for that reason the judgment must be reversed, we have all wasted several months of time or weeks for no reason at all.

* * * * * * * * *

But the question here is, in view of this language, in view of the situation in the Schatte case, as it was at least at the time I read the pleadings a year or so ago, an attempt to plead a conspiracy under the Sherman Act.

Is there any reason to proceed until we have exhausted every effort to know what the Court of Appeals is going to do with that problem?

Mr. Cohn: Your Honor, I think in this case it is much more important that we proceed and have a trial than that this court shall be informed in advance of what the law is on this question of damages.

The Court: But I do not know. Perhaps I am intended to be informed by the last paragraph of the opinion in the Schatte case. *Is there any reason why you gentlemen cannot file a brief, amicus curiae,* upon an application for rehearing and tell the court that there is this case and why it should not be decided before you answer that question? * * *

The Court: But if the Court of Appeals says now that it is our view and we rule that there is no such thing as a cause of action for loss of employment under the Sherman Act, wouldn't it be folly for us to go ahead in the face of it? * * *

The Court: They were discharged; they were locked out in some cases.

Then the court says: "The loss of their rights of employment is not a result of any lessening of commercial competition among the studios."

As applied to our situation I do not know what that means. As applied to the whole problem, you may say that it is ambiguous. But the problem I raised is: *Shouldn't you make every attempt to have the court clarify one way or the other?* It may be the court would, upon a petition, strike out the entire paragraph of that opinion; in other words, say we are not intending to rule upon that problem. That was just thrown in there as a gratuitous dictum, that is all.

(Emphasis ours.)

EXCERPTS FROM OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED ON JULY 28, 1950, IN SCHATTE VS. IATSE, DENYING A MOTION OF PAUL HINST, ONE OF THE APPELLANTS, TO SUBSTITUTE COUNSEL AND FOR LEAVE TO FILE A PETITION FOR REHEARING.

Per Curiam:

Paul Hinst, one of the appellants in the above entitled action, has moved this court for an order substituting Clarence E. Todd as his counsel and for leave to file a petition for rehearing. Both motions are opposed by counsel for the remaining 25 appellants. The motions were submitted on affidavits, briefs and oral argument.

Ordinarily substitution of counsel is granted a litigant upon request. [Citing cases.] But in this case we think the circumstances are such that to permit such a substitution at this stage of the proceedings would result in confusion and perhaps injustice insofar as the remaining twenty-five appellants are concerned.

* * * * * * * * *

It is apparent that so long as this proceeding retains its character as a single action one plaintiff should not be permitted, under the circumstances here presented, to dictate a manner of conducting the litigation contrary to the judgment of counsel who is still the attorney for the other twenty-five plaintiffs. The general rule in class suits is that the member of the class who is the original plaintiff retains control over the action as opposed to other

members of the class who may later seek to intervene. Annotation, 91 A. L. R. 587, 3 Moore's Federal Practice, 23.07 n. 71. This rule, while not directly applicable here, is based on an underlying principle that where several parties are joined on the same side of a single case, orderly procedure requires that decisions be made as to how that side shall conduct the case even though such decisions may not accord with the individual desires and opinions of each member of the side. Such is the situation here. There being a difference of opinion concerning the advisability of filing a petition for rehearing, the opinion of twenty-five plaintiffs, acting through their attorney, must prevail over the opinion of one other plaintiff, acting through another attorney.

Plaintiff Hinst will not be prejudiced. He will doubtless have the opportunity to ask for substitution of counsel in the United States Supreme Court in the event that court decides to review this case.

We are frankly advised by counsel for plaintiff Hinst that the motive underlying the request for substitution of counsel at this time is to permit the filing of a petition for rehearing in order to get a clarification of our decision in this case so as to benefit plaintiffs in an independent action now pending in a lower court. We are unwilling to disrupt the procedure adopted by counsel for twenty-five of the plaintiffs in this action in order to serve such purpose.

Motions denied.

CONSENT OF RESPONDENTS.

Letterhead of
Bodkins, Breslin & Luddy.

August 30, 1950.

Morris E. Cohn, Esq.
Attorney at Law
6305 Yucca Street
Los Angeles 28, California

Dear Mr. Cohn:

Re: Schatte, *et al.*, Petitioners, v. The International Alliance, etc., *et al.*, Respondents (In the Supreme Court of the United States, October Term, 1950, No. 222).

By telephone this afternoon you advised me that it is your intention, as attorney for the plaintiffs in *Conference of Studio Unions, etc., et al., v. Loew's Incorporated, et al.*, No. 7306-WM, now pending in the United States District Court for the Southern District of California, Central Division in accordance with paragraph 9(b) of Rule 27, Revised Rules of the Supreme Court of the United States, to move the United States Supreme Court for leave to file a brief as an amicus curiae in support of the Petition for Writ of Certiorari now pending in the above entitled action.

You have asked me, as attorney for The International Alliance, etc., and Roy M. Brewer, respondents in the above entitled action, to consent to the filing of such brief

by you. I hereby consent, as attorney for said parties, to the filing of such brief by you, but in fairness to my clients and to the Court I very definitely feel that if the Court permits you to file such brief I should be given a reasonable time within which, on behalf of said clients, to file an answering brief. It is, therefore, requested that when you advise the Court of this consent on my part that you also advise it of my desire to file a brief in answer to your brief should the Court permit you to file a brief as an amicus curiae.

Sincerely yours,

s/s MICHAEL G. LUDDY
Of BODKIN, BRESSLIN & LUDDY.

MGL:EL

IN THE

Supreme Court of the United States

October Term 1950

No. 222

OSCAR SCHATTE, ET AL., *Petitioners,*

v.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL., *Respondents.*

OPPOSITION OF PETITIONERS TO THE MOTION OF ROBERT W. KENNY AND MORRIS E. COHN FOR LEAVE TO FILE BRIEFS AMICUS CURIAE.

Petitioners for certiorari, and their counsel, respectfully object to said motion upon the following grounds:

1. Petitioners' cases Nos. 222, 223 and 224 and the related case No. 168 Miscel., arise from the violation of the most sacred rights of American employees, under the Constitution, and also under the Wagner, Taft-Hartley, Social Security and Civil Rights Acts, as well as under the Sherman-Clayton Act. It has been shown in the petition for certiorari that the errors committed by the court below adversely affect millions of employees.

2. The Conference Suit of applicants arises only under the Sherman-Clayton Acts. Any undue emphasis upon it

would be to the detriment of the rights of petitioners under the Constitution and other Acts mentioned above.

3. The motion of applicant is not favored under Rule 27-7(b).

4. The motion of applicants was made after counsel for petitioner refused to consent to the filing of their amicus curiae brief.

5. Any participation in petitioners' case by applicants, or their clients, or associates, would interfere with the conduct thereof by counsel for petitioners in this case No. 222, and in the companion cases, Nos. 223 and 224. Applicants would also bring a cloud of radicalism upon the cases which neither petitioners or their cases deserve, and which counsel is unwilling for them to bear. The unprofessional conduct of applicants in pursuit of their interference, and in violation of the California Rules of Professional Conduct (Appendix p. 8), is hereinafter shown.

6. Applicants do not make their motion "on behalf of petitioners" (cover), or because of any "interest of applicants in the petition for certiorari and in the disposition of the Schatte case on the merits" (P. 5). To the contrary, their motion is made in the interest of their "Conference Suit" (P. 1-5), and in a renewed attempt to intrude themselves upon the Schatte case, in hostility to counsel (P. 4), and with injury and discredit to petitioners and their class.

7. The inference in the opening paragraph of the motion (p. 1), that petitioners union, "Local 946 of United Brotherhood of Carpenters & Joiners", might be among the plaintiffs in the "Conference Suit" is misleading. The fact is that said Kenny and Cohn had included Local 946 among their original plaintiffs therein, without the consent of counsel herein, although it was known that counsel had been engaged in the preparation of this case, for the class, for many months prior thereto, and although this case had been filed before the "Conference Suit." Said action of said

Kenny and Cohn was thereafter corrected by the withdrawal of Local 946 from the "Conference Suit", without prejudice, upon stipulation, and by court order (App. p. 9).

8. The statement in the motion (page 3) that "pursuant to leave of Court petitions in intervention on behalf of several hundred of employees have been filed in the "Conference Suit" might indicate that this included carpenters covered by this case, No. 222, and its companion case, No. 223. The facts are:

(a) A form of proposed contract, intended to siphon carpenters into the "Conference Suit", was circulated among carpenters belonging to the class, during February or March, 1950, in the form shown in the footnote below.[1] This was done without the consent of counsel herein, as is shown by the affidavit of Andrew MacKay, dated June 24, 1950. (Appendix page 10)

The language of said solicited form of agreement shows on its face that it was an attempt by the solicitors thereof to give the "Conference Suit" parties and attorneys control over the legitimate, prior suit herein, and over its companion suit, and to give powers to said Todd that counsel herein would not ask for himself, or tolerate in said Todd, or in his associates in said "Conference Suit."

(b) After said fraud had been appropriately denounced by counsel, and apparently abandoned, said Todd presented a motion, in the "Conference Suit", to intervene for a few mislead members out of the class of 2000 carpenters represented by counsel in cases Nos. 222 and 223. Counsel learned

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[1] I hereby request and authorize Clarence E. Todd to represent me in the lawsuit entitled CONFERENCE OF STUDIO UNIONS and others v. LOEW'S INCORPORATED and others, No. 7306-M, in the United States District Court for the Southern District of California by presenting my claim in the form of a petition in intervention.

In consideration thereof, I agree to pay Clarence E. Todd 33⅓% of all sums recovered from defendants in the above action, or any of them, in satisfaction of my claim, whether the same be recovered by way of settlement, judgment, or otherwise."

of said motion on April 28, 1950, and appeared in open court in opposition thereto on May 1, 1950. The Court denied the motion on that date.

(c) Thereafter, without previous notice to petitioners or counsel, and without their consent, said Kenny attempted to file an "Application of Conference of Studio Unions for Leave to File Brief Amicus Curiae for Reconsideration of Court's Opinion" in the U. S. Court of Appeals of the Ninth Circuit. The court denied the motion.

(d) Thereafter, on May, 1950, Herbert K. Sorrell, President of the Conference of Studio Unions, and as such client of said Kenny and Cohn, undertook to produce one of the Appellants in this Schatte case, and to induce him to substitute said Todd for counsel herein as attorney in this Schatte case, "so as to help the Conference of Studio Unions in its said case No. 7306 WM", as is shown by the affidavit of Thomas W. Hill (Appendix p. 12).

(e) Associates of said Kenny and Cohn did succeed in misleading Paul Hinst, one of the 26 plaintiffs in the Schatte case, and in inducing him to sign a proported substitution of said Todd for counsel herein. The substitution was opposed by counsel in the Court of Appeals. The Court denied the motion for substitution in its supplement opinion thereon dated July 28, 1950 (Appendix pp. 14-15) in the following language thereon:

> Plaintiff Hinst will not be prejudiced. He will doubtless have the opportunity to ask for substitution of counsel in the United States Supreme Court in the event that court decides to review the case.
>
> We are frankly advised by counsel for plaintiff Hinst that the motive underlying the request for substitution of counsel at this time is to permit the filing of a petition for rehearing in order to get a clarification of our decision in this case so as to benefit plaintiffs in an independent action now pending in the lower court. We are unwilling to disrupt the procedure adopted by counsel for 25 of the plaintiffs in this action in order to serve such purpose.

Plaintiff Hintz has not been prejudiced. Counsel has included him among the petitioners for certiorari, and is protecting him with fidelity, the same as though he had never been mislead as aforesaid, in the view that the frauduently induced proported substitution is null and void.

9. The pretense of said Kenny and Cohn that "applicants have sought to comply with the suggestion of the District Court" (P. 5) is not sustained by the language quoted in the motion from the record of what the District Judge said (Motion App. p. 10):

> The Court: But I do not know. Perhaps I am intended to be informed by the last paragraph of the opinion in the Schatte case (Schatte R. 220). *Is there any reason why you gentlemen can not file the brief, amicus curiae,* upon the application for rehearing and tell the court that there is this case and why it should not be decided before you answer that question. (Emphasis added)

Applicants might have stated the reasons hereinbefore set forth if they had so chosen.

10. The Sherman-Clayton Act fourth count in this Schatte case is presented in the petition for certiorari (pp. 3, 5-6, 8, 9-10, 18-19). The error is specified in point 12 (p. 8), and the subject is presented both in the general statement of reason for granting the writ (pp. 9-10) and under the "Tenth" point thereof (pp. 18-19) where conflicts in decisions are pointed out.

There is no question that respondent IATSE labor organization would be liable for acts committed in conspiracy with parties other than labor organizations. *Allen Bradley Co.* v. *Local Union 3 etc.,* 325 U. S. 797, as cited in the petition (p. 19) and as quoted in its appendix (p. 26). That was the principle upon which Loew's Incorporated, one of the respondents herein, sought relief in, and obtained Federal jurisdiction of the subject matter in *Lowe's Inc.* v. *Basson,* 46 Federal Sup. 66.

The lessening of commercial competition is alleged in the complaint (R. 33-34, 134). That is incidental, however, to the big question involved.

The big question is whether the language "any person who shall be injured in his business or property" as used in 15 U. S. C. A. 15, applies to an employee as a "person", and to a collective agreement, and an employment contract, and to the rights of an employee thereunder, as "business or property."

The holding of the court below is in direct conflict with the case cited in the petition (p. 19) and quoted in its appendix (p. 44).

Conclusion.

Petitioners have pointed out that it is vital to many millions of people that collective agreements upon the terms of wages, hours and working conditions be held to be property both under the Sherman-Clayton Acts and under Section 303 of the Taft-Hartley Act, 28 U. S. C. A. 187 (Pet. p. 10).

It was not necessary for counsel for petitioners to sacrifice or minimize the other points presented in the petition for certiorari by elaborating the already adequate presentation upon the Sherman-Clayton Acts point. Counsel respected the rule of the court not to use too many pages in presenting the petition.

Petitioners have had a long, hard struggle for a day in federal court in their cases arising under federal law.

Petitioners and their counsel have suffered protracted delays, and repetitious hardships, from the serious errors of the courts below. These errors have been specified in the three petitions for certiorari Nos. 222, 223, 224. Conflicts between the holdings of the court below and decisions in other Circuits, and of this court, have been presented in the petitions under the reasons why writs of certiorari should be granted. The public interest adds force to the petitions.

Since the filing of the petitions for certiorari, a motion has been made that the Court accept original jurisdiction in the related case of MacKay et al. vs. National Labor Relations Board, et al., No. 168 misc. It is upon the Constitutional right of hearing before Administrative Agencies. It relates directly to this Schatte Case No. 222, and to the Companion Case No. 223.

Wherefore, it is prayed that said motion for leave to file briefs amicus curiae be denied.

Respectfully submitted,

ZACH LAMAR COBB,
Counsel for Petitioners.

APPENDIX.

Rules of Professional Conduct: 33 Cal. (2) 27:

"Rule 2. Section a. A member of the State Bar shall not solicit professional employment by advertisement or otherwise."

"Rule 3. A member of the State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; * * *"

"Rule 10. A member of the State Bar shall not advise the commencement, prosecution or defense of a case, unless he has been consulted in reference thereto. * * *"

"Rule 12. A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. * * *"

"Rule 13. A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; * * *"

Fish v. *The State Bar,* 214 Cal. 215, at 221.

Carpenter v. *State Bar,* 210 Cal. 520, at 521.

People ex rel Karlin v. *Culkin,* 248 N.Y. 465, 162 N.E. 487, as reported in 60 ALR 851, at 855.

Withdrawal of Local 946 From Conference Suit.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 7306-M

CONFERENCE OF STUDIO UNIONS, an unincorporated association, Local 946, of UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, an unincorporated association, ET AL.,

v.

LOEW'S INCORPORATED, a corporation, ET AL.

Stipulation for Dismissal as to Local 946, U.B.C. and J. of A.

IT IS STIPULATED that the above entitled and numbered cause be dismissed, without prejudice, by, and as to, Local 946, of United Brotherhood of Carpenters and Joiners of America, an unincorporated association.
Dated October 26, 1948.

BODKIN, BRESLIN & LUDDY,
By LEONARD S. JANOFSKY,
Attorney for defendant Roy M. Brewer, et al.

GEORGE E. BODLE,
LOUIS R. STEIN,
By GEORGE E. BODLE,
Attorneys for Intervenors.

IT IS SO ORDERED this 5th day of Nov., 1948.

PEIRSON M. HALL,
U. S. District Judge.

Exhibit "A"

ZACH LAMAR COBB,
Attorney for Local 946.

KENNY & COHN,
By ROSS J. MORRIS, JR.,
Attorneys for other plaintiffs.

WRIGHT AND GARRETT,
By HAROLD F. COLLINS,
Attorneys for Producer defendants and other defendants.

O'MELVENY & MYERS,
By HOMER I. MITCHELL,
Attorneys for Producer defendants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT.

No. 12,321

OSCAR SCHATTE, ET AL., *Appellants*,

v.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL., *Appellees*.

Affidavit of Andrew MacKay.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ANDREW MACKAY, being first duly sworn, deposes and says:

1. That he is a citizen of the United States, and State of California, residing in the City of Los Angeles, California.

2. That he is a member of Local 946, United Brotherhood of Carpenters and Joiners of America.

3. That during or about February or March 1950, a mimeographed form of proposed agreement was circulated among members of said Local, reading as follows:

> "I hereby request and authorize Clarence E. Todd to represent me in the lawsuit entitled CONFERENCE OF STUDIO UNIONS and others v. LOEW'S INCORPORATED and others, No. 7306-M, in the United States District Court for the Southern District of California by presenting my claim in the form of a petition in intervention.
>
> "In consideration thereof, I agree to pay Clarence E. Todd 33 1/3% of all sums recovered from defendants in the above action, or any of them, in satisfaction of my claim, whether the same be recovered by way of settlement, judgment, or otherwise."

4. That he is personally acquainted with Herbert K. Sorrell, who is President of the Conference of Studio Unions, hereinafter called Conference, plaintiff in the case of Conference of Studio Unions, et al., v. Loew's, et al., No.

7306-WM. in the United States District Court, Southern District of California, Central Division.

5. That at about the time the printed form of contract was circulated among members of said Union, said Sorrell called affiant on the telephone and asked affiant, as a carpenter and member of said Union, to engage Clarence E. Todd, as his attorney, and authorize said Todd to intervene for him, as intervener, in said Conference case.

6. That affiant replied to said request by saying that I will have to consult my own attorney, Mr. Cobb, about that, and heard no more from said Sorrell.

ANDREW McKAY.

Subscribed and sworn to before
me this 24th day of June, 1950.

HAZEL R. CARSON,
Notary Public in and for said
County and State.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 12,321.

OSCAR SCHATTE, ET AL., *Appellants*,

v.

IATSE, ET AL., *Appellees*.

Affidavit of Thomas W. Hill.

STATE OF CALIFORNIA,
County of Los Angeles, ss.

THOMAS W. HILL, being first duly sworn, deposes and says:

1. That he is a citizen of the United States and State of California, residing in the City of Los Angeles, California.

2. That he is a member of Local 946, United Brotherhood of Carpenters & Joiners of America, and one of the plaintiffs in the above entitled Schatte action.

3. That during the month of May, 1950, affiant encountered Herbert K. Sorrell, president of the Conference of Studio Unions, at the Union hall of said Local 946, in Los Angeles, California, and that the following statements were made in the course of the conversation that ensued:

(a) Said Sorrell stated to affiant that Zach Lamar Cobb, attorney for plaintiffs in the above entitled action, was not competent to handle the Schatte case by himself;

(b) That said Sorrell further stated to affiant that said Cobb had refused to file a motion for rehearing before this Court, and that the Conference of Studio Unions had to have one of the plaintiffs herein substitute another lawyer for said Cobb, so that a motion for rehearing could be filed herein, that would thereby permit the Conference of Studio Unions, and its attorneys, to ask the Court to reconsider the language in its decision so as to help the Conference of Studio Unions in its said case No. 7306-M; and

(c) That affiant thereupon said to said Sorrell, "I am one of the plaintiffs in the Schatte case." To which said Sorrell responded, "Well, you could sign it." To which

affiant replied to said Sorrell, "No, I wouldn't do it without consulting Mr. Cobb." That no further request has been made of affiant.

THOMAS W. HILL.

Subscribed and sworn to before me this 25th day of June, 1950.

HAZEL R. CARSON,
Notary Public in and for said County and State.

Supplemental Opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 12,321

July 28, 1950.

OSCAR SCHATTE, ET AL., *Appellants*,

v.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, RICHARD F. WALSH, ROY M. BREWER, LOEW'S, INCORPORATED, ET AL., *Appellees*.

Before: ORR and POPE, Circuit Judges, and WEINBERGER, District Judge.

PER CURIAM:

Paul Hinst, one of the appellants in the above entitled action, has moved this court for an order substituting Clarence E. Todd as his counsel and for leave to file a petition for rehearing. Both motions are opposed by counsel for the remaining 25 appellants. The motions were submitted on affidavits, briefs and oral argument.

Ordinarily substitution of counsel is granted a litigant upon request.[1] But in this case we think the circumstances are such that to permit a substitution at this stage of the proceedings would result in confusion and perhaps injustice insofar as the remaining twenty-five appellants are concerned.

Appellant Hinst and twenty-five other individuals brought this action for damages arising out of the loss of their employment. The complaint purports to have been brought on behalf of 2,000 other individuals similarly situated but, since each plaintiff's claim is individual and several, and no specific property, can be affected by the action, the action is a "spurious class suit" under Rule 23(a)(3) of the Federal Rules of Civil Procedure. Such a suit is merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct and no member of the

[1] In re Paschal, 1870, 77 U.S. 483; The Flush, 2 Cir. 1921, 277 Fed. 25; Doggett v. Deauville Corp., 5 Cir. 1945, 148 F. 2d 881; Evans v. Ockershausen, App. D.C. 1938, 100 F. 2d 695, 709; United States v. McMurtry, S.D.N.Y., 1927, 24 F. 2d 145; Binafield v. Johnson, D. Mont. 1934, 6 F. Supp. 29, 32.

"class" is bound by a judgment who does not join as plaintiff or intervenor. 3 Moore's Federal Practice, (2nd ed.) § 23.10[1]. Of the twenty-six plaintiffs in the instant case, one, through his attorney, Mr. Todd, has asked for leave to file a petition for rehearing. The other twenty-five plaintiffs, represented by another attorney, consider it as not in their best interests that such a petition be filed. It is apparent that so long as this proceeding retains its character as a single action one plaintiff should not be permitted, under the circumstances here presented, to dictate a manner of conducting the litigation contrary to the judgment of counsel who is still the attorney for the other twenty-five plaintiffs. The general rule in class suits is that the member of the class who is the original plaintiff retains control over the action as opposed to other members of the class who may later seek to intervene. Annotation, 91 A.L.R. 587, 3 Moore's Federal Practice § 23.07 n. 7. This rule, while not directly applicable here, is based on an underlying principle that where several parties are joined on the same side of a single case, orderly procedure requires that decisions be made as to how that side shall conduct the case even though such decisions may not accord with the individual desires and opinions of each member of the side. Such is the situation here. There being a difference of opinion concerning the advisability of filing a petition for rehearing, the opinion of twenty-five plaintiffs, acting through their attorney, must prevail over the opinion of one other plaintiff, acting through another attorney.

Plaintiff Hinst will not be prejudiced. He will doubtless have the oportunity to ask for substitution of counsel in the United States Supreme Court in the event that court decides to review this case.

We are frankly advised by counsel for plaintiff Hinst that the motive underlying the request for substitution of counsel at this time is to permit the filing of a petition for rehearing in order to get a clarification of our decision in this case so as to benefit plaintiffs in an independent action now pending in a lower court. We are unwilling to disrupt the procedure adopted by counsel for twenty-five of the plaintiffs in this action in order to serve such purpose.

Motions denied.

(Endorsed:) Per Curiam opinion on motion to substitute counsel and to file petition for rehearing. Filed July 28, 1950. Paul P. O'Brien, Clerk.

Office - Supreme Court, U. S.
FILED
OCT 24 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.

No. 222.

OSCAR SCHATTE, ET AL., *Petitioners*,

v.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; RICHARD F. WALSH; ROY M. BREWER; LOEW'S, INCORPORATED, ET AL., *Respondents*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

ZACH LAMAR COBB,
929 Citizens National Bank Building,
Los Angeles 13, California
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.